85-1556

Supreme Court U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM JOSEPH STEINGRABER,

Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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QUESTION PRESENTED FOR REVIEW

May a search of a pickup truck in Reading, Pennsylvania be considered to occur at the "functional equivalent" of the border of the United States when the evidence tends to show that a plane from which the truck received some sort of cargo at Reading Airport made a landing at Vero Beach, Florida from the Bahamas without clearing Customs and a later landing at Reading but does not show continuous surveillance between those landings?

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The opinion of the Superior Court of Pennsylvania is published at 483 A. 2d 895.

STATEMENT OF JURISDICTION

The judgment sought to be reviewed was entered on April 23, 1985; reconsideration was denied December 17, 1985. Your Honorable Court has jurisdiction to review said judgment by writ of certiorari by virtue of the Act of June 25, 1948, c. 646, §1, 62 Stat. 928, 18 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is the Fourth Amendment to the United States Constitution, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Petitioner, William Steingraber, was convicted, in a jury trial in the Court of Common Pleas of Berks County, Pennsylvania, of possession of marijuana, possession of marijuana with intent to deliver, and criminal conspiracy.

The evidence that convicted petitioner was seized from a pickup truck owned by another person but driven by him in the vicinity of the Reading Airport in Reading, Pennsylvania. The evidence presented at the suppression hearing, recounted in copious detail in the opinion of the trial court and that of the Superior Court, tended to show that an unknown aircraft without the appropriate clearance was observed by a Miami air traffic controller approaching the United States from a location southeast of Bimini and was lost to the radar screen somewhere in the vicinity of Vero Beach, Florida, that a plane reasonably believed to be the same one landed at Vero Beach, that the pilot left the aircraft just long enough to get fuel, oil, and information concerning weather conditions for Reading, Pennsylvania, that the plane took off again notwithstanding Vero Beach police

efforts to detain it for Customs officials, that a Customs aircraft chased it as far as Baltimore, that the Customs aircraft, which stopped to refuel in Baltimore, was advised upon taking off from Baltimore by New York Control that the plane it wanted had landed in Reading, that something was transferred at Reading Airport from the plane to the truck driven by petitioner, that baled packages containing an initially unidentifiable dark substance were observed within the truck by Pennsylvania state troopers who followed it down a road near the airport, and that the substance was ultimately seized and determined to be marijuana. Co-defendant Guinther was the pilot of the plane, and co-defendant Santarelli was petitioner's passenger in the truck.

The issue raised herein was raised initially via application to suppress

evidence, and also raised on post-verdict motions, on petitioner's appeal to the Superior Court of Pennsylvania, which appeal resulted in affirmance of the conviction on October 26, 1984, and in a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania, which denied review on April 23, 1985 and refused reconsideration of its decision denying review on December 17, 1985.

REASONS FOR GRANTING THE WRIT

The issue raised herein is whether the Superior Court of Pennsylvania erred in upholding the trial court's determination that "[F]or purposes of this case, Reading was located at the functional equivalent of the border[]", when the point of crossing was in Florida and the initial landing was made there. The doctrine whose application is at issue here was characterized as follows in United States v. McDaniel, 463 F. 2d 129, 131 (5th Cir. 1972):

> This is a case allegedly under the aegis of the "border search" doctrine, whose borders have never been geodetically defined and whose legal undulations are manifold. Transits and other paraphernalia, both legal and paralegal, lead to no certain perimeters. Given precedential latitude and constitutional longitude, we conclude that the search under the spotlight in this case came within the legal confines of a border search and within the constitutional confines of the Fourth Amendment.

It is submitted that the boundaries of the doctrine were transgressed in the instant case. It is acknowledged that probable cause is not required for a border search, and that searches at the border of persons and property crossing into the country are reasonable simply by virtue of the fact that they occur at the border. United States v. Ramsey, 431 U.S. 606, 97 S. Ct. 1972, 52 L. Ed. 2d 617 (1977). It is also acknowledged that an inland location may be the "functional equivalent" of the border; as Your Honorable Court observed in Almeida-Sanchez v. United States, 413 U.S. 266, 273, 93 S. Ct. 2535, 2539, 37 L. Ed. 2d 596, 602-03 (1973):

> [A] search of the passengers and cargo of an airplane arriving at a St. Louis airport after a nonstop flight from Mexico City would clearly be the functional equivalent of a border search.

While petitioner does not contend that the unauthorized takeoff of the suspect plane from Vero Beach in and of itself defeated the right of Customs officers or local law enforcement authorities acting at their direction to search it, the evidence in this case fails to show that the flight from Vero Beach to Reading was nonstop. The Customs officer who piloted the pursuing plane testified as follows on direct examination at the pretrial hearing (pp. 162-63):

> Q. Did you have your aircraft refueled in Baltimore?
>
> A. Yes, sir.
>
> Q. And then what happened?
>
> A. I departed Baltimore. En route to Reading, Pennsylvania, I established radio communications with the New York Center after I was handed off out of Baltimore, and I asked the - - -
>
> MR. BERNHART: I object to that conclusion, after the hand off from Baltimore to New York Center. That's something only the people in New

York and Baltimore could know.

THE COURT: Well, he heard it. It was communicated to him, I assume, wasn't it?

THE WITNESS: Yes, Your Honor. In fact, I participated in it. When you are handed off, you go from one controller to another controller. One controller said this is Baltimore departure control. I am going to switch you to a New York Center controller. Call him up on this frequency, and they assign you a new frequency on your radio. You dial it in, and say New York, this is me, and they say, okay, we have you in radar contact.

BY MR. SUSS:

Q. Is that what took place in this instance?

A. Yes, sir.

Q. Did you have communications with New York Center?

A. Yes, sir.

Q. What information was exchanged between yourself and New York Center?

A. I asked them if they knew where the aircraft was at that time, and he says he had just landed at Reading.

Q. Did you specify what aircraft you were referring to?

A. I did not specify the aircraft. I do not recall specifying what aircraft.

Q. Did you then proceed to Reading?

A. Yes, sir.

While no issue is presently raised with respect to the hearsay nature of this testimony, the testimony establishes only that someone at the New York Center believed the aircraft the officer wanted had landed in Reading. What observations that someone made are nowhere in evidence, and the result is a gap in surveillance between Baltimore and Reading, a gap sufficient to allow for an interim landing elsewhere.

The leading Circuit case on the issue of when an inland search is a legitimate border search is Alexander v. United States, 362 F. 2d 379 (9th Cir. 1966). The Court stated:

> [T]he legality of the search must be tested by a determination whether the totality of the surrounding

> circumstances, including the time and distance elapsed as well as the manner and extent of surveillance, are such as to convince the fact finder with reasonable certainty that any contraband which might be found in or on the vehicle at the time of search was aboard the vehicle at the time of entry into the jurisdiction of the United States. [Id. at 382.]

The Ninth Circuit has also held that the border search doctrine extends to searches of vehicles not believed to have crossed the border, when there is a reasonable certainty that parcels have been transferred to such vehicle from one that has crossed the border. United States v. Weil, 432 F. 2d 1320 (9th Cir. 1970) Petitioner has no quarrel with this proposition and acknowledges that the circumstantial evidence tended to show that something from the plane had been placed in the car he was driving, but submits that the requisite certainty that that something had crossed the border was lacking. The "reasonable certainty"

standard established by Alexander and Weil is a higher standard than that of probable cause: United States v. Kessler, 497 F. 2d 277 (9th Cir. 1974). That standard was not met here. The observation of the Court in United States v. Bowman, 502 F. 2d 1215, 1219 (5th Cir. 1974) is apropos here:

> [T]here comes a point after a border crossing where an individual's relationship with the border is so attenuated that a search may not be justified as a "border search."

With respect to the alternative ground of probable cause, it should suffice to note that the material in the pickup was not visually identified as marijuana until the vehicle had been detained. With respect to the contention that petitioner lacks standing because he did not own the truck, it should suffice to note that while Rakas v. Illinois, 439 U.S. 128, 99 S. Ct. 421,

58 L. Ed. 2d 387 (1978) limited the standing of passengers in vehicles to object to searches thereof, Your Honorable Court refused in Rakas to hold that one must have a common-law property interest in searched premises to object to the search.

In straining the border search rule to allow the search of petitioner's truck in Reading, Pennsylvania, the Pennsylvania courts have sanctioned an egregious departure from the accepted and usual course of judicial proceedings. Review by writ of certiorari is accordingly appropriate and is respectfully requested.

Respectfully submitted,

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APPENDIX TO

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IN THE SUPERIOR COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

VINCENT ANTHONY SANTARELLI,
Appellant

No. 543 Philadelphia 1983

COMMONWEALTH OF PENNSYLVANIA

v.

WILLIAM M. GUINTHER,
Appellant

No. 714 Philadelphia 1983

COMMONWEALTH OF PENNSYLVANIA

v.

WILLIAM JOSEPH STEINGRABER,
Appellant

No. 818 Philadelphia 1983

BEFORE: WIEAND, OLSZEWSKI,
AND POPOVICH, JJ.

OPINION BY OLSZEWSKI, J.

October 26, 1984

This appeal follows each man's convictions on counts of possession of a Schedule I controlled substance, to wit, marijuana,[1] possession with intent

to deliver,[2] and criminal conspiracy.[3] The cases were consolidated for trial and again for appeal. We address in turn the claims of each appellant.

William A. Guinther

Guinther argues: (1) insufficient evidence introduced by the Commonwealth against Guinther mandates reversal and discharge; (2) the trial court erred by refusing to instruct the jury on the offense of possession of less than 30 grams of marijuana; and (3) prosecutorial misconduct during closing argument mandates reversal. Guinther's argument concerning the sufficiency of the evidence is developed for the first time on appeal.

Guinther's trial counsel raised the issue of sufficiency of the evidence in post-verdict motions. He failed, however, to develop the issue in his post-trial brief. Finding that Guinther had waived the issue, the trial court

refused to reach the merits of the argument. Lower ct. op. at 2 n. 3.

On appeal, Guinther by his new counsel argues that failure to brief the issue constitutes ineffective assistance of counsel. Ineffective assistance will be found where counsel without reason neglects a claim of arguable merit. Commonwealth v. Upsher, 497 Pa. 621, 626-627, 444 A. 2d 90, 92 (1982); Commonwealth v. Knox, 304 Pa. Super. 368, 373, 450 A. 2d 725, 727 (1982). To reach the issue of ineffective assistance we must first address the foregone claim, the sufficiency of the evidence.

Appellant asserts that the evidence introduced by the Commonwealth against him is insufficient in law to prove beyond a reasonable doubt all the elements of the crimes with which he was charged. We disagree.

In assessing the sufficiency of the evidence on appeal, the standard is well-settled. We must ask whether, accepting as true, all the evidences and all reasonable inferences deductible from such evidence upon which the trier of fact could have based his verdict, the evidence and the inferences are sufficient in law to prove guilt beyond a reasonable doubt. Commonwealth v. Williams, 468 Pa. 357, 365, 362 A. 2d 244, 248 (1976). Moreover, in reviewing the evidence, we must consider it in the light most favorable to the Commonwealth. Commonwealth v. Ilgenfritz, 466 Pa. 345, 348, 353 A. 2d 387, 389 (1976).

After carefully reviewing the record, we are satisfied to adopt the statement of facts set forth in the lower court opinion.

In November, 1980 Wendell Mihalak was employed by the Federal

Aviation Administration (FAA) as an air traffic controller at the Reading Airport in Reading, Pennsylvania and had been so employed for approximately twelve years (N.T. 228-30.) Mihalak knew defendant Guinther through several parties given by Mihalak's boss and attended by both Mihalak and Guinther, through Guinther's association with the American Bonanza Society which is a flying organization having an office building at the Reading Airport, and also through Guinther's status as a flight instructor, and had spoken with Guinther over the radio about a thousand times during the preceding seven or eight years (N.T. 229-31). Because of his familiarity with Guinther's voice, Mihalak recognized it when a man piloting a twin-engine Baron 6729 Tango called him for take-off taxi instructions on November 10, 1980 at 5:00 a.m. while Mihalak was on duty at the Reading Airport (N.T. 231). In response to Mihalak's query, Guinther informed Mihalak that he was headed for West Palm Beach, Florida, and engaged in some further conversation with Mihalak regarding tail winds before taking off (N.T. 231).

On November 11, 1980 Raymond Gillman was employed by the FAA and was working as an air traffic control specialist at the Vero Beach Airport's flight service station in Vero Beach, Florida (N.T. 304). After receiving a telephone call that evening Gillman observed an aircraft taxiing into the parking

ramp area at the Vero Beach Airport at approximately 8:15 p.m. (N.T. 304-05). From his vantage point approximately two hundred feet from where the aircraft was parked in a well-lit area, and with the intermittent aid of binoculars, Gillman noticed that the aircraft bore the numbers N6729T and that it appeared to be carrying several large brown boxes in the cabin area behind the pilot and co-pilot's seats (N.T. 305-06, 308). Gillman also saw one individual get out of the aircraft, which individual was a man who appeared to be in his fifties, wore a suit and tie, and walked with a very pronounced limp (N.T. 306-07). Shortly after exiting the aircraft this man entered the flight service station, where he was observed by Gillman from a distance of twenty-five feet (N.T. 307). Gillman identified the individual who got out of the aircraft N6729T as being the defendant William Guinther (N.T. 307-08). Approximately one-half hour after he first saw the aircraft N6729T, Gillman observed it taxiing out and away from the parking ramp, and then it disappeared from his view (N.T. 309).

On the evening of November 11, 1980 Officer Andrew Bradley of the Vero Beach Police Department received a telephone call, and as a result of that call, went in his police vehicle to the Vero Beach Airport for the purpose of stopping a plane (N.T. 321). Once out on the taxiway Officer Bradley observed

an aircraft bearing the numbers N6729T taxiing out towards the main runway (N.T. 322). He approached the plane from the front, passed it on its left side, keeping pace with it as it continued to taxi (N.T. 322, 324). Officer Bradley turned on his police unit's siren and flashing blue lights as he initially approached the aircraft, and kept them on as he traveled alongside it (N.T. 322-23). Bradley also aimed his spotlight into the cockpit, and was able to see the pilot's face as the pilot turned towards the light (N.T. 324). Bradley described the pilot as a man in his early to mid-fifties, with graying hair and dark-rimmed, clear-lensed glasses, and identified him as the defendant William Guinther (N.T. 325). Bradley kept his spotlight on and pointed at the cockpit as he paralleled the plane, traveling three or four feet off the right wing tip at a speed of ten to fifteen miles per hour for a distance of two hundred and fifty to three hundred yards (N.T. 323-24, 326). He observed what he believed to be luggage behind the pilot's seat and an umbrella handle in the cockpit (N.T. 325-26). He also obtained a second look at the pilot's face when the pilot again turned to look at Bradley's police vehicle (N.T. 326-27). As the aircraft and Bradley's vehicle reached the end of the taxiway, the former turned onto the main runway, and Bradley cut across a strip of grass in an attempt to get in front of the plane

(N.T. 324). He was successful in his attempt, but was obliged to move out of the way in order to avoid being hit by the aircraft (N.T. 329). The plane then took off over the roof of a second police vehicle which had been dispatched to Officer Bradley's aid (N.T. 330).

At 3:00 a.m. on November 12, 1980 Wendell Mihalak, while on duty at the Reading Airport, received a radio call from a pilot then flying over nearby Ephrata, Pennsylvania, and Mihalak recognized his voice as being that of the defendant William Guinther (N.T. 232). Using the call sign November 9488 Sierra, the pilot requested landing instructions, which Mihalak supplied (N.T. 232). Following Mihalak's instructions, the pilot landed and taxied over to the west part of the ramp near the American Bonanza Society building, and Mihalak observed an individual exit the aircraft, walk over to the Bonanza Building, and turn on a light (N.T. 232). Two or three minutes later Mihalak saw a pickup truck without a cap or camper on the back leave the area, and five minutes after that Mihalak saw it return (N.T. 232-33). Shortly thereafter Mihalak noticed a large blue pickup truck with a white cap or camper coming up a road next to the Bonanza building (N.T. 232). After stopping at a gate, this second truck drove up to the aircraft, approaching it from the front, and pulled next to the plane's right side, remaining there for five or ten minutes before

leaving via the same road it had arrived (N.T. 234). In the half hour immediately preceding the landing of the above-mentioned aircraft, no other planes landed at the Reading Airport, and in the half hour immediately thereafter, only one plane, a United States Customs aircraft, landed (N.T. 234-35).

On November 11 and 12, 1980 George Kontrabecki was a pilot and law enforcement officer employed by United States Customs and stationed in Jacksonville, Florida (N.T. 444). On the evening of November 11, Kontrabecki took off from Jacksonville in a Customs aircraft for the purpose of pursuing another plane, and was accompanied on this flight by Houston Allman, a Customs Air Officer who rode in the rear of the Customs aircraft (N.T. 404, 445). After landing his plane in Baltimore to refuel, Kontrabecki continued on to the Reading Airport, where he landed at approximately 3:30 a.m. on November 12 (N.T. 446). Mihalak then directed Kontrabecki over to the western part of the ramp near the Bonanza Building, and as Kontrabecki was taxiing in that direction he observed a twin-engine aircraft bearing the numbers N6729T parked in front of the building and a bluish or greenish pickup truck with a white camper shell backed up at an angle to the aircraft's right side (N.T. 235, 446-48, 451). By the time Kontrabecki reached the ramp this

pickup truck became mobile, proceeding towards the west gate without its lights on (N.T. 448-49). Kontrabecki followed the truck in his plane to the vicinity of the west gate, where the truck's lights were turned on (N.T. 449). The truck then proceeded through the gate and down a hill out of Kontrabecki's sight (N.T. 449).

At approximately 3:30 a.m. on November 12, 1980 State Troopers Leon Huey and Louis Belsterling proceeded to the Reading Airport in a patrol car, traveling north on Route 183 (N.T. 555-56, 620). After passing the front entrance to the airport, Trooper Huey, who was driving, made a right hand turn onto a service road leading to the west gate, whereupon both Huey and Belsterling observed a set of headlights coming towards them from the vicinity of the west gate (N.T. 56-57, 621). Both officers watched these headlights proceeding down the road towards their patrol car, and within a few seconds of stopping their vehicle at the first intersection, were able to observe the source of the headlights, i.e., a bluish-green pickup truck with a white or light cap or camper which also arrived at the same intersection and stopped (N.T. 556-56, 563-65, 621-22). The pickup truck then made a lefthand turn at the intersection and proceeded towards Route 183, whereupon Huey made a U-turn in the intersection and followed the truck (N.T. 557-58). Huey continued to follow the truck

as it turned left onto Route 183, and was able to observe several square-shaped packages in the rear portion of the truck inside the camper (N.T. 558-59, 622). As the truck neared the main entrance to the airport on Route 183 Huey turned the patrol vehicle's red lights on, and the pickup truck pulled over (N.T. 559, 622-23). Using his public address system, Huey told the occupants to get out of their vehicle and proceed to the rear of the truck, which they did (N.T. 559-60). Both Huey and Belsterling identified the truck's occupants as defendants William Steingraber and Vincent Santarelli, the former having exited the vehicle from the driver's side and the latter from the passenger's side (N.T. 560, 623-24, 639, 651-52). The police then instructed the occupants to get back into their vehicle and return to the area from which they had just come, whereupon both re-entered the truck and, followed by Huey and Belsterling, proceeded back up the service road and stopped a few feet from the west gate (N.T. 561-62, 624-26).

Three or four minutes after Customs Officer George Kontrabecki lost sight of the pickup truck which he initially saw parked near the aircraft N6729T he observed a pickup truck fitting the same description coming back up the hill towards the west gate, followed by a marked State Police vehicle (N.T. 451-53). Customs Officer Houston Allman, while standing near the gate, saw

the two men in the vicinity of the pickup truck, and identified them as defendants Steingraber and Santarelli (N.T. 453-54). Allman looked into the rear of the pickup truck from the outside and saw numerous packages enclosed in brown paper or boxes, at least some of which were torn in places, and through these tears was able to see a substance protruding which appeared to be marijuana (N.T. 406, 412, 421). Allman then opened the rear door of the truck and being satisfied that the substance was marijuana, he walked over to the men who had been in the pickup truck and read them their rights (N.T. 406). Kontrabecki also looked into the back of the truck and saw what appeared to be marijuana in a number of torn packages, and subsequently observed, from the outside of the aircraft with the aid of a flashlight, a small amount of vegetable matter or debris resembling marijuana on the floor inside the aircraft N6729T (N.T. 453-55). In addition, Kontrabecki tried the handles on the passenger and cargo doors of the aircraft N62729T, and found that he was able to open them (N.T. 456-57).

On November 12, 1980 Corporal Gary Stiver of the Pennsylvania State Police took rolled ink impressions of all ten of defendant Guinther's fingerprints, and transferred them to a fingerprint card (Exhibit 2) (N.T. 392-95). Corporal Roman Petrosky, also of the Pennsylvania State Police,

> testified that six latent fingerprints lifted from inside the aircraft N6729T matched various fingerprints on Exhibit 2, and stated that in his opinion, the prints found inside the plane and those on Exhibit 2 were made by the same person (N.T. 752-68). Paul Skrimcovsky, a criminalist with the Pennsylvania State Police, tested the debris (Exhibit 2) found inside the aircraft N6729T, and the eleven packages (Exhibit 10) removed from the pickup truck, and found that all contained marijuana and that the eleven packages had a combined net weight of 343.6 pounds (N.T. 846-52). Trooper Ronald Haberstroh, a fourteen year member of the Pennsylvania State Police Troop L vice unit, testified that in his opinion, possession of 343.6 pounds of marijuana is not consistent with personal use (N.T. 869-72).

Lower ct. op. at 9-10. Further, we agree with the Honorable Richard Eshelman that:

> The above-recited evidence, particularly that relating to defendant Guinther's taking off from Reading from Florida in aircraft N6729T, his presence the following day at Vero Beach, Florida in aircraft N6729T, which carried what one witness described as large brown boxes, his evasion of Vero Beach police, his use of the incorrect call sign 9488 Sierra when landing in Reading, the presence of the pickup truck shortly thereafter

> next to aircraft N6729T for five or ten minutes, the observation by state police officers of the pickup proceeding from the west gate onto Route 183 loaded with packages, which truck was occupied by Steingraber and Santarelli and which package contained 343.6 pounds of marijuana, the presence of marijuana residue and Guinther's fingerprints in aircraft N6729T, and the fact that possession of 343.6 pounds of marijuana is not consistent with personal use of such substance, was more than sufficient evidence to allow the jury to conclude that Guinther transported 343.6 pounds of marijuana from Vero Beach to Reading in aircraft N6729T, that as pilot Guinther has both the power and intent to control the marijuana, that the marijuana was transferred from this plane to the pickup truck by Steingraber and Santarelli and transported in the truck occupied by them, that the latter two defendants had the power and intent to control the contraband while it was transferred to and located and transported in the truck, and that all of the above was done pursuant to an agreement among the three defendants to accomplish the same. Having drawn the above conclusion, the jury could properly find the defendants guilty of possession of the controlled substance, marijuana, possession with intent to deliver it, and conspiracy to commit these crimes.

Lower ct. op. at 9-10.

Guinther relies on three out-of-state cases to support his argument. Dubry v. State, 582 S.W. 2d 841 (Tex. Crim. App. 1979); U.S. v. Burgos, 579 F. 2d 747 (2d Cir. 1978); and Walden v. State, 579 S.W. 2d 499 (Tex. Crim. App. 1979). We receive these decisions as persuasive authority but not binding precedent. See Commonwealth v. National Bank & Trust Co. of Central Pennsylvania, 469 Pa. 187, 364 A. 2d 1331 (1976). The two Texas cases stand for the proposition that conviction under a "constructive possession" theory requires proof of an affirmative link between the accused and the contraband. See Willis v. State, 636 S.W. 2d 602, 605 (1982). In Willis, the court found the requisite link in evidence of proximity and control. That same link exists in this case in proof that Guinther piloted the plane from Vero Beach to Reading.[4] Similarly, Burgos

supports the proposition that mere presence is not enough. We agree. In the instant case, however, evidence that Guinther had flown the plane from Vero Beach must be considered with the fact of his flight from Florida authorities, the presence of marijuana on the floor of the plane, the discovery of the 343.6 pounds of marijuana and the attendant circumstances. A review of the record below leads us to the conclusion that the facts presented at trial by the Commonwealth were such that a jury could find beyond a reasonable doubt that Guinther committed the crime charged against him.

Finding the omitted claim meritless, we do not reach the second prong of the test - whether the course chosen by counsel had some reasonable basis designed to effectuate the interests of the client. See Commonwealth ex rel. Washington v.

Maroney, 427 Pa. 599, 235 A. 2d 349 (1967).

Judge Eshelman's able opinion has resolved Issues 2 and 3. We note that Guinther's second argument fails on its own terms. The doctrine of lesser-included offenses evolved at common law to prevent the prosecution from failing where some element of the crime charged was not made out. "There is no duty on a trial judge to charge upon law which has no applicability to presented facts." Commonwealth v. Wilds, 240 Pa. Super. 278, 279, 362 A. 2d 273, 278 (1976). In Wilds, police had searched the defendant and his home. They seized approximately 4 pounds from defendant's home but less than 30 grams from his person. On appeal, this Court looked to three factors, the quantity of marijuana seized, the disparate penalties for the various offenses, and the apparent jury confusion over the charge. We

reversed on the trial court's refusal to charge the jury on possession of less than 30 grams of marijuana. In the instant case, the .0025 ounces of marijuana represents the residue scraped from the floor of [an] airplane found at 3:30 in the morning in the vicinity of a truck carrying 343 pounds of marijuana. On the facts, we find Guinther's argument somewhat less than compelling.

Judgment of sentence affirmed.

Vincent A. Santarelli

Santarelli charges: (1) failure to suppress illegally seized contraband introduced by the Commonwealth against Santarelli, (2) failure to grant a change of venue or other relief necessary to ensure a fair trial, (3) insufficient evidence introduced by the Commonwealth against Santarelli, (4) improper closing argument by the Assistant District Attorney; and (5) failure to instruct

the jury in accordance with the defendant's points for charge mandate reversal. After a careful review of the record, we find Judge Eshelman's opinion has disposed of Issues 1, 3, 4, and 5. We find appellant's argument on Issue 2 without merit. Disposition of a motion for a change of venue lies within the sound discretion of the trial judge. Commonwealth v. Casper, 481 Pa. 143, 392 A. 2d 287 (1978). As a rule, a defendant alleging prejudicial pre-trial publicity must show actual prejudice. An exception exists where pretrial publicity is "so sustained, so pervasive, so inflammatory, and so inculpatory as to demand a change of venue...." Commonwealth v. Frazier, 471 Pa. 121, 127, 369 A. 2d 1224, 1227 (1977). The trial judge makes the determination based on the content of the publicity. Here Judge Eshelman, in his Disposition of

Defendant's Omnibus Pretrial Motions for Relief, found the attendant publicity "contained objective, non-inflammatory reporting." Finding of Fact 40. Absent proof of actual prejudice, appellant's second claim must fail.

Judgment of sentence affirmed.

William J. Steingraber

Steingraber argues: (1) the trial court erred by refusing to suppress the evidence; (2) prosecutorial misconduct during closing argument mandates reversal; (3) insufficient evidence introduced by the Commonwealth against Steingraber mandates removal (sic); (4) failure to grant a change of venue or other relief necessary to ensure a fair trial mandates a reversal; and (5) remand for resentencing of Steingraber is required where the judge did not consider factors individual to Steingraber. Judge Eshelman, in his thorough opinion,

resolved Issues 1, 2 and 3. After a careful review of the record, we adopt his reasoning. Issue 4 we have discussed supra as regards appellant Santarelli. The same reasoning applies here. As regards Steingraber's fifth argument, our review of the record satisfies us that Judge Eshelman did give conscientious consideration to the circumstances of the offense and the background and character of Steingraber. See R. 1895a - 1906a and R. 1912a - 1917a.

Judgment affirmed.

Wieand, J., Concurs in the Result.

FOOTNOTES:

[1]35 Pa.C.S. §780-113(a)(16).

[2]35 Pa.C.S. §780-113(a)(30).

[3]18 Pa.C.S. §903(a)(i).

[4]The court in Dubry suggested that the facts of the case would support a conviction for conspiracy. 582 S.W. 2d at 844. However, the criminal conspiracy sections of the Texas Penal Code did not apply to violations of the Controlled Substances Act. Id., cf. Commonwealth v. Davenport, 307 Pa. Super. 102, 452 A. 2d 1058 (1982) (affirming convictions for criminal conspiracy and unlawful delivery of a controlled substance.)

IN THE SUPERIOR COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

VINCENT ANTHONY SANTARELLI,
Appellant

No. 543 Philadelphia 1983

COMMONWEALTH OF PENNSYLVANIA

v.

WILLIAM M. GUINTHER,
Appellant

No. 714 Philadelphia 1983

COMMONWEALTH OF PENNSYLVANIA

v.

WILLIAM JOSEPH STEINGRABER,
Appellant

No. 818 Philadelphia 1983

JUDGMENT

October 26, 1984

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the above captioned matter, of the Court of Common Pleas of BERKS County be, and is AFFIRMED.

IN THE COURT OF COMMON PLEAS OF
BERKS COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

WILLIAM M. GUINTHER,
Defendant

Criminal No. 80181301

COMMONWEALTH OF PENNSYLVANIA

v.

VINCENT SANTARELLI,
Defendant

Criminal No. 80181201

COMMONWEALTH OF PENNSYLVANIA

v.

WILLIAM JOSEPH STEINGRABER,
Defendant

Criminal No. 80181601

OPINION

W. RICHARD ESHELMAN, J.

December 21, 1982

Defendants were each charged by information with possession of, and possession with intent to deliver, a

Schedule I controlled substance,[1] namely, marijuana, and also with conspiracy.[2] After hearings held thereon, defendants' Omnibus Pretrial Motions for Relief were denied, and on June 15, 1982, jury selection in defendants' consolidated trial commenced. On June 23, 1982, the jury returned verdicts of guilty on all charges against each defendant. Defendants each filed motions for new trial and/or arrest of judgment, argument thereon was scheduled, supporting briefs were filed, and defendants' posttrial motions are now before this court for disposition. In order to facilitate analysis and discussion we have grouped the numerous issues raised into several broad categories.

I. Sufficiency of the evidence.

At the outset defendants Santarelli and Steingraber contend that the evidence was insufficient to sustain the verdicts,

and Steingraber also contends that the verdicts were contrary to the weight of the evidence.[3] Whether a verdict is contrary to the weight of the evidence is a determination within the discretion of the trial court. Commonwealth v. Chapman, 255 Pa. Super. 265, 386 A. 2d 994 (1978). For a verdict to be contrary to the weight of the evidence, the evidence must be opposed to the finding of guilt and not consistent with it. Commonwealth v. Dale, 232 Pa. Super. 213, 335 A. 2d 454 (1975). In determining whether the evidence is sufficient to sustain the verdict, the reviewing court must accept as true all direct and circumstantial evidence upon which the jury could properly have based its verdict, and if this evidence and the inferences arising therefrom, when viewed in the light most favorable to the Commonwealth, are sufficient in law to

establish beyond a reasonable doubt that the defendant is guilty of the crimes for which he has been found guilty, the reviewing court will sustain the verdict. Commonwealth v. Rose, 483 Pa. 382, 396 A. 2d 1221 (1979); Commonwealth v. Johnston, 258 Pa. Super. 429, 392 A. 2d 869 (1978).

The evidence adduced at trial may be summarized as follows. In November, 1980 Wendell Mihalak was employed by the Federal Aviation Administration (FAA) as an air traffic controller at the Reading Airport in Reading, Pennsylvania and had been so employed for approximately twelve years (N.T. 228-30.) Mihalak knew defendant Guinther through several parties given by Mihalak's boss and attended by both Mihalak and Guinther, through Guinther's association with the American Bonanza Society which is a flying organization having an office building

at the Reading Airport, and also through Guinther's status as a flight instructor, and had spoken with Guinther over the radio about a thousand times during the preceding seven or eight years (N.T. 229-31). Because of his familiarity with Guinther's voice, Mihalak recognized it when a man piloting a twin-engine Baron 6729 Tango called him for take-off taxi instructions on November 10, 1980 at 5:00 a.m. while Mihalak was on duty at the Reading Airport (N.T. 231). In response to Mihalak's query, Guinther informed Mihalak that he was headed for West Palm Beach, Florida, and engaged in some further conversation with Mihalak regarding tail winds before taking off (N.T. 231).

On November 11, 1980 Raymond Gillman was employed by the FAA and was working as an air traffic control specialist at the Vero Beach Airport's flight service

station in Vero Beach, Florida (N.T. 304). After receiving a telephone call that evening Gillman observed an aircraft taxiing into the parking ramp area at the Vero Beach Airport at approximately 8:15 p.m. (N.T. 304-05). From his vantage point approximately two hundred feet from where the aircraft was parked in a well-lit area, and with the intermittent aid of binoculars, Gillman noticed that the aircraft bore the numbers N6729T and that it appeared to be carrying several large brown boxes in the cabin area behind the pilot and co-pilot's seats (N.T. 305-06, 308). Gillman also saw one individual get out of the aircraft, which individual was a man who appeared to be in his fifties, wore a suit and tie, and walked with a very pronounced limp (N.T. 306-07). Shortly after exiting the aircraft this man entered the flight service station, where

he was observed by Gillman from a distance of twenty-five feet (N.T. 307). Gillman identified the individual who got out of the aircraft N6729T as being the defendant William Guinther (N.T. 307-08). Approximately one-half hour after he first saw the aircraft N6729T, Gillman observed it taxiing out and away from the parking ramp, and then it disappeared from his view (N.T. 309).

On the evening of November 11, 1980 Officer Andrew Bradley of the Vero Beach Police Department received a telephone call, and as a result of that call, went in his police vehicle to the Vero Beach Airport for the purpose of stopping a plane (N.T. 321). Once out on the taxiway Officer Bradley observed an aircraft bearing the numbers N6729T taxiing out towards the main runway (N.T. 322). He approached the plane from the front, passed it on its left side, keeping pace

with it as it continued to taxi (N.T. 322, 324). Officer Bradley turned on his police unit's siren and flashing blue lights as he initially approached the aircraft, and kept them on as he traveled alongside it (N.T. 322-23). Bradley also aimed his spotlight into the cockpit, and was able to see the pilot's face as the pilot turned towards the light (N.T. 324). Bradley described the pilot as a man in his early to mid-fifties, with graying hair and dark-rimmed, clear-lensed glasses, and identified him as the defendant William Guinther (N.T. 325). Bradley kept his spotlight on and pointed at the cockpit as he paralleled the plane, traveling three or four feet off the right wing tip at a speed of ten to fifteen miles per hour for a distance of two hundred and fifty to three hundred yards (N.T. 323-24, 326). He observed what he

believed to be luggage behind the pilot's seat and an umbrella handle in the cockpit (N.T. 325-26). He also obtained a second look at the pilot's face when the pilot again turned to look at Bradley's police vehicle (N.T. 326-27). As the aircraft and Bradley's vehicle reached the end of the taxiway, the former turned onto the main runway, and Bradley cut across a strip of grass in an attempt to get in front of the plane (N.T. 324). He was successful in his attempt, but was obliged to move out of the way in order to avoid being hit by the aircraft (N.T. 329). The plane then took off over the roof of a second police vehicle which had been dispatched to Officer Bradley's aid (N.T. 330).

At 3:00 a.m. on November 12, 1980 Wendell Mihalak, while on duty at the Reading Airport, received a radio call from a pilot then flying over nearby

Ephrata, Pennsylvania, and Mihalak recognized his voice as being that of the defendant William Guinther (N.T. 232). Using the call sign November 9488 Sierra, the pilot requested landing instructions, which Mihalak supplied (N.T. 232). Following Mihalak's instructions, the pilot landed and taxied over to the west part of the ramp near the American Bonanza Society building, and Mihalak observed an individual exit the aircraft, walk over to the Bonanza Building, and turn on a light (N.T. 232). Two or three minutes later Mihalak saw a pickup truck without a cap or camper on the back leave the area, and five minutes after that Mihalak saw it return (N.T. 232-33). Shortly thereafter Mihalak noticed a large blue pickup truck with a white cap or camper coming up a road next to the Bonanza building (N.T. 232). After stopping at a gate, this second

truck drove up to the aircraft, approaching it from the front, and pulled next to the plane's right side, remaining there for five or ten minutes before leaving via the same road it had arrived (N.T. 234). In the half hour immediately preceding the landing of the above-mentioned aircraft, no other planes landed at the Reading Airport, and in the half hour immediately thereafter, only one plane, a United States Customs aircraft, landed (N.T. 234-35).

On November 11 and 12, 1980 George Kontrabecki was a pilot and law enforcement officer employed by United States Customs and stationed in Jacksonville, Florida (N.T. 444). On the evening of November 11, Kontrabecki took off from Jacksonville in a Customs aircraft for the purpose of pursuing another plane, and was accompanied on this flight by Houston Allman, a Customs

Air Officer who rode in the rear of the Customs aircraft (N.T. 404, 445). After landing his plane in Baltimore to refuel, Kontrabecki continued on to the Reading Airport, where he landed at approximately 3:30 a.m. on November 12 (N.T. 446). Mihalak then directed Kontrabecki over to the western part of the ramp near the Bonanza Building, and as Kontrabecki was taxiing in that direction he observed a twin-engine aircraft bearing the numbers N6729T parked in front of the building and a bluish or greenish pickup truck with a white camper shell backed up at an angle to the aircraft's right side (N.T. 235, 446-48, 451). By the time Kontrabecki reached the ramp this pickup truck became mobile, proceeding towards the west gate without its lights on (N.T. 448-49). Kontrabecki followed the truck in his plane to the vicinity of the west gate, where the truck's lights were turned

on (N.T. 449). The truck then proceeded through the gate and down a hill out of Kontrabecki's sight (N.T. 449).

At approximately 3:30 a.m. on November 12, 1980 State Troopers Leon Huey and Louis Belsterling proceeded to the Reading Airport in a patrol car, traveling north on Route 183 (N.T. 555-56, 620). After passing the front entrance to the airport, Trooper Huey, who was driving, made a right hand turn onto a service road leading to the west gate, whereupon both Huey and Belsterling observed a set of headlights coming towards them from the vicinity of the west gate (N.T. 556-57, 621). Both officers watched these headlights proceeding down the road towards their patrol car, and within a few seconds of stopping their vehicle at the first intersection, were able to observe the source of the headlights, i.e., a

bluish-green pickup truck with a white or light cap or camper which also arrived at the same intersection and stopped (N.T. 556-57, 563-65, 621-22). The pickup truck then made a lefthand turn at the intersection and proceeded towards Route 183, whereupon Huey made a U-turn in the intersection and followed the truck (N.T. 557-58). Huey continued to follow the truck as it turned left onto Route 183, and was able to observe several square-shaped packages in the rear portion of the truck inside the camper (N.T. 558-59, 622). As the truck neared the main entrance to the airport on Route 183 Huey turned the patrol vehicle's red lights on, and the pickup truck pulled over (N.T. 559, 622-23). Using his public address system, Huey told the occupants to get out of their vehicle and proceed to the rear of the truck, which they did (N.T. 559-60). Both Huey and

Belsterling identified the truck's occupants as defendants William Steingraber and Vincent Santarelli, the former having exited the vehicle from the driver's side and the latter from the passenger's side (N.T. 560, 623-24, 639, 651-52). The police then instructed the occupants to get back into their vehicle and return to the area from which they had just come, whereupon both re-entered the truck and, followed by Huey and Belsterling, proceeded back up the service road and stopped a few feet from the west gate (N.T. 561-62, 624-26).

Three or four minutes after Customs Officer George Kontrabecki lost sight of the pickup truck which he initially saw parked near the aircraft N6729T he observed a pickup truck fitting the same description coming back up the hill towards the west gate, followed by a

marked State Police vehicle (N.T. 451-53). Customs Officer Houston Allman, while standing near the gate, saw the two men in the vicinity of the pickup truck, and identified them as defendants Steingraber and Santarelli (N.T. 453-54). Allman looked into the rear of the pickup truck from the outside and saw numerous packages enclosed in brown paper or boxes, at least some of which were torn in places, and through these tears was able to see a substance protruding which appeared to be marijuana (N.T. 406, 412, 421). Allman then opened the rear door of the truck and being satisfied that the substance was marijuana, he walked over to the men who had been in the pickup truck and read them their rights (N.T. 406). Kontrabecki also looked into the back of the truck and saw what appeared to be marijuana in a number of torn packages, and subsequently observed,

from the outside of the aircraft with the aid of a flashlight, a small amount of vegetable matter or debris resembling marijuana on the floor inside the aircraft N6729T (N.T. 453-55). In addition, Kontrabecki tried the handles on the passenger and cargo doors of the aircraft N62729T, and found that he was able to open them (N.T. 456-57).

On Novwember 12, 1980 Corporal Gary Stiver of the Pennsylvania State Police took rolled ink impressions of all ten of defendant Guinther's fingerprints, and transferred them to a fingerprint card (Exhibit 2) (N.T. 392-95). Corporal Roman Petrosky, also of the Pennsylvania State Police, testified that six latent fingerprints lifted from inside the aircraft N6729T matched various fingerprints on Exhibit 2, and stated that in his opinion, the prints found inside the plane and those on Exhibit

2 were made by the same person (N.T. 752-68). Paul Skrimcovsky, a criminalist with the Pennsylvania State Police, tested the debris (Exhibit 2) found inside the aircraft N6729T, and the eleven packages (Exhibit 10) removed from the pickup truck, and found that all contained marijuana and that the eleven packages had a combined net weight of 343.6 pounds (N.T. 846-52). Trooper Ronald Haberstroh, a fourteen year member of the Pennsylvania State Police Trcop L vice unit, testified that in his opinion, possession of 343.6 pounds of marijuana is not consistent with personal use (N.T. 869-72).

Defendant Santarelli presented no evidence, but both defendants Steingraber and Guinther presented reputation testimony. Guinther presented two witnesses who testified that they had discussed Guinther's reputation with members of the community, that these

community members had expressed the opinion that Guinther was a truthful, law-abiding individual, and that, to the witneses' knowledge, no one had ever expressed a contrary opinion (N.T. 923-26). Guinther's third witness was unable to testify that he had heard others express an opinion of Guinther as being truthful and law-abiding (N.T. 917-21). Defendant Steingraber presented one witness who testified that he had never discussed Steingraber's reputation for honesty with anyone, and a second witness who testified that she had discussed Steingraber's reputation, knew that others believed him to be a "good and honest" person, and had never heard anyone express a contrary opinion (N.T. 928-30).

The above-recited evidence, particularly that relating to defendant Guinther's taking off from Reading for Florida in aircraft N6729T, his presence

the following day at Vero Beach, Florida in aircraft N6729T, which carried what one witness described as large brown boxes, his evasion of Vero Beach police, his use of the incorrect call sign 9488 Sierra when landing in Reading, the presence of the pickup truck shortly thereafter next to aircraft N6729T for five or ten minutes, the observation by state police officers of the pickup proceeding from the west gate onto Route 183 loaded with packages, which truck was occupied by Steingraber and Santarelli and which package contained 343.6 pounds of marijuana, the presence of marijuana residue and Guinther's fingerprints in aircraft N6729T, and the fact that possession of 343.6 pounds of marijuana is not consistent with personal use of such substance, was more than sufficient evidence to allow the jury to conclude that Guinther transported 343.6 pounds

of marijuana from Vero Beach to Reading in aircraft N6729T, that as pilot Guinther had both the power and intent to control the marijuana, that the marijuana was transferred from this plane to the pickup truck by Steingraber and Santarelli and transported in the truck occupied by them, that the latter two defendants had the power and intent to control the contraband while it was transferred to and located and transported in the truck, and that all of the above was done pursuant to an agreement among the three defendants to accomplish the same. Having drawn the above conclusion, the jury could properly find the defendants guilty of possession of the controlled substance, marijuana, possession with intent to deliver it, and conspiracy to commit these crimes.

We are not persuaded by the argument of Santarelli, one of the two occupants

of the pickup truck, that the evidence was insufficient to show his awareness of and his intent and power to control the marijuana. The number of packages and large quantity of marijuana seized, its being unloaded during a short period of time from the aircraft into the pickup truck and being immediately transported from the site of the aircraft in the pickup truck operating without headlights as far as the west gate and thereafter with headlights toward and onto Route 183, the truck being occupied by Santarelli, the proximity of Santarelli while in the truck to the contraband, the exposure of the contraband in the truck to plain view by virtue of the torn packaging material, and the hour and place of these events, all militate against such a conclusion. These factors refute Santarelli's argument that he occupies a position similar to that of

an unfortunate hitchhiker. In short, considering the totality of the circumstances the jury properly inferred and concluded from the evidence that Santarelli possessed the contraband, possessed it with intent to deliver it, and conspired to do so. Commonwealth v. Cash, 240 Pa. Super. 123, 367 A. 2d 726 (1976); Commonwealth v. Gilchrist, 255 Pa. Super. 252, 386 A. 2d 603 (1978). For all of the foregoing reasons, we conclude that the evidence is consistent with and more than sufficient to sustain the findings of guilt.[4]

II. Suppression of Evidence.

All three defendants next contend that the pretrial hearing judge erred in refusing to suppress the eleven packages of marijuana (Exhibit 10) removed from the pickup truck and the marijuana debris (Exhibit 12) removed from the aircraft N6729T, all of which evidence,

defendants argue, was seized in violation of their constitutional right to be protected against unreasonable searches and seizures. After conducting five days of hearings on this and other issues, the pretrial hearing judge on May 26, 1982 entered Findings of Fact and Conclusions of Law disposing of, inter alia, defendants' motions to suppress evidence.

Initially, it is clear that the pretrial hearing judge properly concluded, in Conclusion of Law No. 1, that defendants lacked "standing to challenge the legality of observations, inspections, searches and seizures by United States Customs and state police officers involving the aircraft and pickup truck and contraband (marijuana) located therein, as each of said defendants . . . failed to establish that he had a reasonable expectation of privacy in

either vehicle." Defendants, though charged with possessory offenses, may no longer claim "automatic standing" under Jones v. United States, 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960), as the Jones rule has been repudiated by the United States Supreme Court in United States v. Salvucci, 448 U.S. 83, 100 S. Ct. 2547, 65 L. Ed. 2d 619 (1980). Under Salvucci a defendant must demonstrate a reasonable expectation of privacy in goods seized or places searched in order to establish standing, and "mere possession" of goods, without more, is not determinative of such an expectation. Further, even prior to Salvucci, the United States Supreme Court ruled that a defendant's legitimate presence on the premises searched does not automatically confer upon him a reasonable expectation of privacy therein. Rakas v. Illinois, 439 U.S. 128, 99 S.

Ct. 421, 58 L. Ed. 2d 387 (1978).

We reject the argument advanced by defendants that the automatic standing rule remains the law in Pennsylvania despite its repudiation in Salvucci. The essence of defendant's contention is that when the Pennsylvania Supreme Court adopted the automatic standing rule in Commonwealth v. Weeden, 457 Pa. 436, 322 A. 2d 343 (1974), it did so not only as a matter of federal constitutional law, but also as a matter of state constitutional law.

We can find absolutely no support for this argument in either Weeden or the cases citing it. That part of the Weeden opinion dealing with the adoption of the automatic standing rule in Pennsylvania discussed only Jones and other federal cases. No Pennsylvania cases, statutes, or constitutional provisions are cited as providing even

a partial basis for the rule's adoption. Further, in Commonwealth v. Treftz, 465 Pa. 614, 626, 351 A. 2d 265, 270, n. 11 (1976), a case citing Weeden and discussing standing in general, the Pennsylvania Supreme Court said that "[i]n Commonwealth v. Weeden, supra, the Court's decision to grant standing . . . rested on the Jones v. United States, supra, 'automatic standing' doctrine." It is thus evident from Weeden and Treftz that automatic standing in Pennsylvania was grounded on federal case law construing the Fourth Amendment, and not on Article I, Section 8 of the Pennsylvania Constitution.

The Superior Court of Pennsylvania has confirmed this view of Weeden by its decision in Commonwealth v. Sell, 288 Pa. Super. 371, 432 A. 2d 206 (1981). In Sell, a defendant who otherwise would have been entitled to automatic standing

was denied the benefit of that rule on the basis of the United States Supreme Court's holding in Salvucci, and was instead required to establish "actual standing" premised upon a legitimate expectation of privacy. Further, Sell was cited with approval in Commonwealth v. Eliff, 300 Pa. Super. 423, 446 A. 2d 927 (1982), wherein the Superior Court again stated that a defendant charged with a possessory offense must nonetheless demonstrate "actual standing" in order to challenge an alleged Fourth Amendment violation. Thus, the clear implication of these two Superior Court opinions is that automatic standing in Pennsylvania was originally premised upon federal law alone, and that Salvucci not only overruled the automatic standing rule of Jones but effectively repudiated Weeden as well.

Turning to the facts in the instant

case, defendants have presented absolutely no evidence which would establish their legitimate expectations of privacy in either of the places observed and searched or in the contraband seized. None of the defendants have alleged or proven ownership of the truck, airplane, or contraband, and in fact the pretrial hearing testimony of United States Customs Officer Kontrabecki was that the aircraft was registered to a Page Smith of Mattsville, North Carolina, and that the truck was registered to a Joanne Esterly, identified by Santarelli as his daughter (Pretrial Suppression Notes of Testimony [S.T.] 204, 175; Findings of Fact Nos. 37 and 32). The record does not indicate whether defendant Guinther had been given permission to pilot the aircraft by its owner or whether Santarelli and Steingraber had permission to use the truck, although evidence of

such permission, even if presented, would not necessarily establish defendants' standing. Rakas v. Illinois, supra. Further, defendants can hardly claim a reasonable expectation of privacy in the truck and its contents when Santarelli and Steingraber allowed the marijuana to be exposed to plain view through torn wrapping paper and an uncurtained window in the truck. Also, defendants cannot claim an expectation of privacy in the aircraft, since it was abandoned on the airport parking strip and the marijuana debris therein was also plainly visible from the outside through its windows. Further, although Guinther challenges the search of the truck, he has not even alleged that he was ever in or had any rights with respect to the truck. Applying the applicable test to all the facts and circumstances we must confirm our finding that defendants have no

standing to challenge the actions taken by state police and customs officers with respect to the pickup truck and the aircraft N6729T.

However, the pretrial hearing judge also properly found that even if defendants had any standing, the warrantless observations, inspections, searches, and seizures which took place in this case could nonetheless be justified on several grounds, the first of these being a customs inspection rationale. Pretrial hearing testimony of Feceral Aviation Administration (FAA) personnel, U.S. Customs Officers, Vero Beach police and Pennsylvania State police, as reflected by more detailed Findings of Fact Nos. 2 through 33, established in summary that aircraft N6729T was tracked in flight by the FAA's Miami Center in Miami, Florida, from a point approximately 50 miles southeast

of Bimini Island in the Bahamas to Vero Beach Airport, Florida, where FAA personnel observed it land loaded with brown boxes in the cabin; that gasoline was purchased and weather instructions between Vero Beach and Reading were obtained and the aircraft took off notwithstanding efforts of the Vero Beach police to detain the plane for customs inspection; that the aircraft had not given notice of a flight plan, had not requested customs inspection, and had not identified itself by way of "squawker"; that the aircraft was tracked by the FAA's Miami Center north toward Jacksonville; that all of the above information was furnished by FAA's Miami Center to U.S. Customs officers who so informed George Kontrabecki, a U.S. Customs pilot and enforcement officer at Jacksonville; that information as to spotting and location of aircraft

by FAA's Miami Center had proven reliable in the past; that Kontrabecki was furnished by the FAA's Jacksonville Center with a radar vector which enabled him, accompanied by U.S. Customs Officers Allman and Butler, to identify the aircraft and pursue it in a U.S. Customs plane north toward Reading; that Kontrabecki requested the FAA to direct the police to detain the pursued aircraft N6729T at Reading Airport and when the customs plane was landing at Reading Airport Kontrabecki observed a bluish-green pickup truck with a white camper back up to the aircraft and then leave the area; that upon aircraft N6729T landing at Reading Airport, FAA controller Mihalak at Reading, on request of the FAA's New York Center and of Kontrabecki, directed the state police on authority of U.S. Customs to detain the aircraft which had just landed at Reading and

the persons involved, as well as to detain a bluish-green pickup truck with a white camper which was leaving the airport area and have it return to the airport (S.T. 353-354), which information was relayed by the state police dispatcher Zeller to state police officers Huey and Belsterling (S.T. 506-507, 516, 521); that Huey and Belsterling observed the described pickup truck leaving the airport and proceeding on Route 183 and from the outside of the truck observed torn packages loaded in the truck with brown vegetable material protruding which appeared to be marijuana; that Huey and Belsterling then stopped the truck which was occupied by defendants Santarelli and Steingraber and instructed them to return to where they came from; that upon return to the airport area U.S. Customs and police officers observed from the outside of the truck that it

was loaded with packages of what appeared to be marijuana, resulting in seizure of the truck and contraband; and that observation of the interior of aircraft N6729T from outside by U.S. Customs Officer Kontrabecki disclosed what appeared to be marijuana inside the aircraft resulting in seizure of the aircraft and contraband.

These facts were clearly sufficient to support the conclusion of the pretrial hearing judge that the aircraft and pickup truck were observed, inspected, searched, and seized "at the functional equivalent of the border pursuant to a lawful customs inspection and seizure by authorized U.S. Customs officers in possession of reliable information allowing them to conclude or to infer with a high degree of probability or with reasonable certainty that a border crossing had taken place." (Conclusion of Law No.

2(a)). Once customs officials obtain sufficient information that a particular vehicle or aircraft has crossed the United States border, they may search that vehicle or aircraft at the border or its functional equivalent without a warrant and without probable cause to believe that the vehicle or aircraft has been employed by its occupants in criminal activity. United States v. Stone, 659 F. 2d 569 (5th Cir. 1981); United States v. Ivey, 546 F. 2d 139 (5th Cir. 1977). See also 19 C.F.R. §162.11. Although Reading, Pennsylvania is obviously removed from the United States border, it was nonetheless the first place in which customs officials were afforded an opportunity to conduct an inspection of the aircraft from the time it was first sighted 50 miles southeast of Bimini Island in the Bahamas, after which it crossed the border and

landed at Vero Beach, Florida, where it took off shortly thereafter notwithstanding police efforts to stop it for customs inspection, and flew to the Reading airport. Further, the flight of the plane from the time it was first sighted was monitored by FAA personnel and was under visual surveillance part of the time by U.S. Customs pilot Kontrabecki, all as described in Findings of Fact Nos. 3 through 20. Under the circumstances any contention that Kontrabecki lacked sufficient information to conclude that the plane he pursued and searched was the same plane that was sighted in the Bahamas and landed at Vero Beach Airport and then at the Reading Airport is clearly without merit. Therefore, for purposes of this case, Reading was located at the functional equivalent of the border.

Although the pickup truck itself

never crossed the border, shortly after aircraft N6729T landed, the truck was observed by Kontrabecki at the Reading airport stopped alongside of aircraft N6729T, which did make such a crossing. Also, in addition to all of the other information known to him, Kontrabecki had been informed that packages or boxes were initially observed inside the plane at Vero Beach. Shortly after Kontrabecki arrived in Reading and observed the pickup truck stopped alongside the plane, he and U.S. Customs Officer Allman observed packages or boxes inside the pickup truck, and immediately thereafter Kontrabecki observed that there were no longer any packages or boxes in the aircraft. Under all the facts and circumstances, the nexus between the truck and the border was sufficient to justify the search of the truck and the aircraft under a customs inspection rationale. United

States v. Lueck, 678 F. 2d 895 (11th Cir. 1982).

Clearly, then, the status of Kontrabecki and of Allman as authorized United States Customs Officers justified the actions they took in observing, inspecting, searching, and seizing both the pickup truck and the aircraft without a warrant. Further, Kontrabecki and Allman, as Customs Officers, on the basis of reliable information received by them and their observations of the aircraft and the truck, could properly request the assistance of Pennsylvania State Police Officers Huey and Belsterling in stopping the truck as it left the Airport, the assistance of Huey in observing, inspecting, searching, and seizing the truck and aircraft, dusting the aircraft for fingerprints, and collecting debris from the aircraft. See United States v. Ivey, supra. By

acting at the request of Customs Officers, the state police officers became the authorized "agents" of United States Customs, and their actions taken in compliance with the request constituted actions of Customs Officers. For all of the above reasons we conclude that the facts in this case satisfy the requirements for a valid Customs inspection, search and seizure.

Additionally, the observations, inspections, searches, and seizures which occurred in the instant case can all be sustained on traditional search and seizure grounds. Troopers Huey and Belsterling clearly possessed sufficient reliable information obtained from state police broadcasts relaying the United States Customs request to detain the aircraft at Reading Airport and to stop the described pickup truck leaving the airport and have it return to the airport,

as well as information obtained from personal observations of the described pickup truck departing the airport and of apparent contraband being transported by the truck, to conclude that criminal activity was afoot. Troopers Huey and Belsterling were therefore justified in stopping the truck just outside the main gate to the Reading Airport and temporarily detaining truck occupants Steingraber and Santarelli by requesting them to "return to the area from which they had just come," which constituted a proper "intermediate response" required for further investigation. See Commonwealth v. Johnson, 275 Pa. Super. 343, 418 A. 2d 754 (1980).

Thereafter, Trooper Huey and Customs Officer Allman had probable cause to search and seize the pickup truck and its contents and to arrest its occupants by virtue of their close range

observations, made while outside the truck, of apparent marijuana therein. These observations, combined with prior observations and reliable information obtained as set forth above and in Findings of Fact, certainly justified Huey and Allman in concluding that defendants Santarelli and Steingraber were committing or had committed a crime. Similarly, Customs Officer Kontrabecki had probable cause to seize the aircraft, authorize its search, and seize the marijuana therein when he observed, while standing outside the aircraft just after having observed the packages or boxes of apparent marijuana in the pickup truck, that the plane's seats were arranged so as to provide for a large cargo area which no longer contained packages or boxes and that apparent marijuana was present on the floor between the seats. These observations, together with

Kontrabecki's prior observations of movements of the aircraft and pickup truck and reliable information received by him regarding the plane's flight, as set forth above and in Findings of Fact, warranted Kontrabecki's conclusion that the plane had been used in the commission of a crime.

The fact that contraband was in plain view within both the aircraft and truck not only provided investigating officers with probable cause to search and seize, but also made a warrant unnecessary. Although the views of the contraband obtained by police and customs officers did not constitute "inadvertent" observations occurring during a lawful intrusion into a constitutionally protected area, but rather occurred before any such intrusion while investigating officers were outside the truck and plane, the warrantless seizure of the marijuana

was nonetheless justified on the basis of the exigent circumstances which attended the search of the truck and plane, both of which are movable vehicles. Commonwealth v. Adams, 234 Pa. Super. 475, 341 A. 2d 206 (1975). See also United States v. Ross, 456 U.S. 798, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982), and cases cited therein.

Even assuming that the stopping by State Police Officers Huey and Belsterling of the pickup truck and instructing occupants Steingraber and Santarelli to return to the area from which they had just come is viewed as an arrest, rather than a stopping and detention for investigatory purposes, there was probable cause for making such arrest. At the time Customs Officer Kontrabecki requested that the local police be directed to stop the truck, he was in possession of sufficient

reliable information regarding the plane's flight and had made sufficient personal observations while taxiing into the Reading Airport of the aircraft and pickup truck, to conclude that a crime had been or was being committed. His knowledge alone, therefore, was sufficient to supply probable cause, irrespective of what Huey and Belsterling knew.

In any event, Officers Huey and Belsterling themselves had probable cause to arrest by virtue of the reliable information they received via state police broadcast, the fact that the truck and its movement met the description given by the police broadcast, their personal observations made from outside the truck of apparent contraband being transported in the truck, and their knowledge as trained police officers of the modes and patterns of operations of drug traffickers, Commonwealth v. Fiore, 281

Pa. Super. 1, 421 A. 2d 1116 (1980); Commonwealth v. Allen, 287 Pa. Super. 88, 429 A. 2d 1113 (1981), wherefore the seizure of the marijuana was incidental to such arrest.

Defendants raise three other contentions concerning the ruling of the pretrial hearing judge denying suppression of the marijuana seized.

First, although we conclude that defendants lacked standing to object to the searches and seizures involving the aircraft and truck and contraband, we nevertheless will discuss briefly defendants' contentions that the hearsay evidence relied upon by the pretrial hearing judge to substantiate his conclusion that investigating officers had probable cause to search the aircraft and truck did not meet the requirements of the Aguilar-Spinelli test. Briefly stated, these requirements in effect

prevent law enforcement authorities from acting on an informant's "tip" without being apprised of the informant's basis for concluding that a suspect possessed contraband and the reasons for believing the informant to be reliable. See Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964) and Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969).

Although the requirements of Aguilar and Spinelli are to be strictly applied when confidential, unidentified informants are the source of information, as was the case in Aguilar and Spinelli, it has been held that the Aguilar-Spinelli test need not be applied to a named citizen who comes forward with information whereby the police should be permitted to assume they are dealing with a credible person in the absence of special circumstances suggesting otherwise.

Commonwealth v. Sudler, 496 Pa. 295, 436 A. 2d 1376 (1981). See LaFave on Search and Seizure, Vol. 1, §3.5. This same consideration should apply, and even more so, when the informants are FAA personnel, U.S. Customs Officers and police officers gathering and furnishing information in the course of performing their official duties, as in the instant case. The reasons for crediting such information are self-evident, and indeed, law enforcement officers and related agencies, in the absence of special circumstances indicating otherwise, could not operate effectively were they required to first verify every bit of information furnished through official channels before relying and acting upon such information.

In any event, we conclude that the requirements of Aguilar-Spinelli were satisfied in the instant case in that

the police broadcast to stop and have the pickup truck return to the airport at the request of U.S. Customs was based on detailed circumstances supplied by reliable FAA, U.S. Customs and Vero Beach police personnel through official channels, which along with personal observations by U.S. Customs Officer Kontrabecki constituted probable cause for his request that the police stop and detain the truck, and the state police acted properly by relying thereon and complying therewith. In addition, the observations by the police officers Huey and Belsterling of the pickup truck leaving the airport transporting numerous packages of apparent marijuane clearly gave rise not only to reasonable suspicion that criminal activity was afoot but in fact constituted sufficient probable cause for seizure of the contraband and making an arrest. Upon return of the

pickup truck to the airport further observations by police and U.S. Customs officers of the packages of apparent marijuana in the truck provided additional probable cause for seizure of the contraband and arrest of the occupants.

The courts have repeatedly held that law enforcement officers may rely on information received by police broadcast for making an arrest based on probable cause, or for stopping and temporarily detaining for investigation based on reasonable suspicion that criminal activity may be afoot, and in the latter case if upon further observation and investigation giving rise to probable cause, an arrest may be made. Commonwealth v. Selp, 285 Pa. Super. 551, 428 A. 2d 183 (1981); Commonwealth v. Benson, 239 Pa. Super. 100, 361 A. 2d 695 (1976).

Second, defendants Guinther and

Steingraber challenge findings of fact Nos. 16, 19, and 34 as being unsupported by the evidence. However, defendants' contentions in this regard are refuted by the record (S.T. 154-55, 627-28, 396-401; 157-64; 454, 599-601, 665-68).

Finally, defendant Guinther contends, citing Commonwealth v. Sexton, 485 Pa. 17, 400 A. 2d 1289 (1979), that error occurred when he was denied a lineup prior to being identified by Officer Bradley at the preliminary hearing. However, it is settled that a defendant has no constitutional right to a pretrial lineup. Commonwealth v. Liverpool, 294 Pa. Super. 133, 439 A. 2d 786 (1982). Further, Sexton is distinguishable from the instant case in that Officer Bradley, unlike the identifying witness in Sexton, was not the only witness supplying evidence identifying defendant Guinther for the crimes charged. Commonwealth

v. Liverpool, 439 A. 2d at 789, n. 10. In any event, Guinther was not prejudiced by his not being afforded a lineup, as the circumstances surrounding Bradley's original observation of Guinther, set forth in Finding of Fact 9, clearly demonstrate that Bradley's identification testimony had a basis independent of any suggestiveness inherent in the preliminary hearing and of events occurring in the Philadelphia Customs Office, and there was therefore no substantial likelihood of irreparable misidentification. (Finding of Fact No. 38; Conclusion of Law No. 4). See Commonwealth v. Davis, 293 Pa. Super. 447, 439 A. 2d 195 (1982).

III. Change of Venue and Related Issues.

Defendants next argue that the pretrial hearing judge and trial judge erred in refusing to grant defendants' motions for change of venue and/or in

refusing to take certain other measures allegedly necessary to ensure that pretrial publicity did not prejudice defendants' right to a fair trial. The relevant facts are as follows: On July 7-8, August 5-6, and September 9, 1981, the pretrial hearing judge held hearings (hereinafter suppression hearings) on defendants' Omnibus Pretrial Motions for Relief. Defendants' motions to close said hearings to the press and public were denied (S.T. 1). Defendants Santarelli and Steingraber, but not Guinther, included in their pretrial motions a motion for change of venue, and in support thereof defendant Santarelli introduced an unnumbered exhibit, which the court ordered on September 9, 1981 to be made part of the Santarelli case record, consisting of twenty-one articles and/or photographs from Reading local newspapers dealing

with this case. On May 26, 1982, the pretrial hearing judge filed Findings of Fact and Conclusions of Law denying, inter alia, the requested change of venue, and by attached order impounded said findings and conclusions pursuant to Pa. R. Crim. P. 323.

On June 15, 1982, the first day of jury selection, defense counsel brought to the attention of the trial judge an article appearing in that morning's edition of The Reading Times entitled "Jury Selection to Begin in Pot Trial". (Pretrial Exhibit 1). Defendants again requested change in venue, or that trial be continued until June 18, when a new jury panel would be called in, or that the court grant additional peremptory challenges, in that order of preference. The trial judge denied the motions for change of venue and continuance, but granted each defendant five, instead

of three, peremptory challenges (Voir Dire 4). By agreement of counsel voir dire was conducted off the record unless and until otherwise requested. On June 16, after seventy-eight prospective jurors had been questioned, voir dire was completed and the jury of twelve plus two alternates was sworn.

Defendants initially contend that the pretrial hearing judge erred in refusing to close the suppression hearings to the press and public. However, this refusal was justified in view of the strong preference for open suppression hearings expressed in Commonwealth v. Hayes, 489 Pa. 419, 414 A. 2d 318 (1980). Further, a substantial portion of the testimony presented at the suppression hearings, including the origin of the suspect plane, the failure of its pilot to comply with customs regulations, and the tracking of its course northward

by the FAA, the seizure of marijuana from the aircraft piloted by Guinther and from the pickup truck occupied by Steingraber and Santarelli, had already become a matter of public record at the preliminary hearing (Preliminary Hearing Transcript 76-97); therefore, to have closed the suppression hearings would have served little if any purpose. Finally, more than nine months (September 10, 1981 to June 15, 1982) intervened between the last publicity evidenced by defendant Santarelli's unnumbered exhibit of newspaper articles and photographs, and the start of defendants' trial, which time period was more than sufficient to allow the effects of pretrial publicity to dissipate. The fact that the pretrial hearing judge impounded his disposition of defendants' pretrial motions is no indication, as contended by defendants, that he believed

his refusal to close the suppression hearings to have been incorrect; rather this action was a legitimate step taken pursuant to Pa. R. Crim. P. 323 to ensure that publicity did not occur as a result of the filing of the disposition of pretrial motions, and that the beneficial effects of the nine month "cooling off" period between September 10, 1981 and June 15, 1982 were not lessened. Further, such impounding was in harmony with defendants' original request that the pretrial hearing be closed.

As concerns defendants' motions for change of venue, it is settled that the disposition of such motions lies within the sound discretion of the trial judge, whose ruling will not be disturbed absent an abuse of that discretion. Commonwealth v. Casper, 481 Pa. 143, 392 A. 2d 287 (1978). Generally, a defendant seeking to demonstrate that

pretrial publicity deprived him of a fair trial must show actual prejudice in the empaneling of the jury, i.e., that one or more of the jurors formed a fixed opinion of defendant's guilt or innocence as a result of such publicity. Commonwealth v. Casper, supra; Commonwealth v. Kichline, 468 Pa. 265, 361 A. 2d 282 (1976). The only exception to this rule occurs where pretrial publicity is "so sustained, so pervasive, so inflammatory, and so inculpatory as to demand a change of venue without putting the defendant to any burden of establishing a nexus between the publicity and actual jury prejudice." Commonwealth v. Frazier, 471 Pa. 121, 127, 369 A. 2d 1224, 1227 (1977). In order to ascertain whether such a situation exists, the trial judge must first consider the content of the publicity, and specifically must determine whether it is inflammatory

and emotional in nature, whether it refers to any prior criminal record the defendant may have had, and whether it reports any confessions allegedly made by the defendant. Commonwealth v. Frazier, supra. However, the pretrial hearing judge, in Finding of Fact 40 of his Disposition of Defendants' Omnibus Pretrial Motions for Relief, properly found that the publicity which attended this case contained none of the prejudicial elements enumerated above. Therefore, jury prejudice cannot be presumed, and defendants must demonstrate its existence in order to prevail.

Defendants argue that the pretrial hearing judge, in his Findings of Fact and Conclusions of Law disposing of defendants' pretrial motions, should have made some determination as to how much of the pretrial publicity stemmed from information provided by police and

other prosecutorial officers. We do not take such a broad view of the case law. Although some cases do seem to suggest that the fact that any publicity concerning a defendant's case can be traced to official sources is a consideration favoring change of venue, see, e.g., Commonwealth v. Kivlin, 267 Pa. Super. 270, 406 A. 2d 799 (1979), other cases merely suggest that official reports to the news media become a concern only when they deal with inherently prejudicial material such as that already mentioned above. Commonwealth v. Casper, supra; Commonwealth v. Pierce, 451 Pa. 190, 303 A. 2d 209 (1973). See also 1 R. Wasserbly, Pennsylvania Criminal Practice §1108 (1981). Our research leads us to conclude that the latter is the better view. Therefore, once the pretrial hearing judge had concluded that the publicity of record contained

none of the three types of prejudicial material previously mentioned, further analysis regarding the source of such (non-existent) publicity was of course precluded.

The voir dire transcript in the instant case indicates that all counsel were afforded ample opportunity to inquire into the jury panel's exposure to pretrial publicity, and that every prospective juror who stated that he or she had formed a fixed opinion of defendants' guilt or innocence was successfully challenged for cause. Although nineteen of seventy-eight jurors questioned admitted to having a fixed opinion and were excused,[5] this does not in and of itself demonstrate prejudice. Commonwealth v. Smith, 480 Pa. 524, 391 A. 2d 1009 (1978). Commonwealth v. Cohen, 489 Pa. 167, 413 A. 2d 1066 (1980), cited by defendants and which held that a refusal to change

venue was an abuse of discretion where two-thirds of the jurors questioned had formed an opinion concerning defendant's guilt or innocence, and 53% were excused for irrevocable prejudgment of the case, is clearly distinguishable on its facts. Most importantly, only 24% of the jurors questioned had fixed an opinion of defendant's guilt or innocence, a percentage less than half the size of that in Cohen. Secondly, the publicity surrounding Cohen was highly inflammatory, as evidenced, inter alia, by the repeated media labeling of defendant's crime as a "contract killing," reports that defendant was the only one of three co-defendants able to afford bail, news stories attributing delay in the proceedings to defendant, and the widespread coverage given certain intemperate remarks allegedly made by the District Attorney and his staff.

Further, there was an inadequate "cooling off" period in Cohen prior to trial. In short, Cohen must be read in light of its facts, and it does not compel a finding of jury prejudice in the instant case.

Such a finding is likewise not mandated by the responses of prospective jurors Joyce Adam and Ronald Haas to a voir dire question regarding their ability to render a fair verdict in the case. Both individuals said they could not, Ms. Adam because she knew a great many details about defendants' case, was involved in youth counseling, and was aware of the effects of substances such as marijuana on young people, and Mr. Haas because he "knew defendants too well." (Voir Dire 9). Neither Ms. Adam nor Mr. Haas was selected to serve on defendants' jury, and although their statements were made in the presence

of some jurors who did ultimately serve, Mr. Haas' response was merely a neutral statement indicating his familiarity with defendants, rather than any positive or negative assessment of their characters, and Ms. Adam's answer, in addition to disclosure of her familiarity with the details of the case, was simply a statement of awareness of the effects of marijuana on young people, which is a matter of common knowledge among members of the general public, and was not prejudicial so as to require the dismissal of the entire jury panel. This is especially true where, as here, defendants' challenges for cause were liberally allowed, and the voir dire record is devoid of any indication that anyone having a fixed opinion of defendants' guilt or innocence was seated on the jury.

A change of venue was also not

required by the publication, during and immediately prior to voir dire, of several articles in Reading local newspapers (Pretrial Exhibits 1, 2 and 3), which articles were substantially a summary of publicity regarding defendants' case following a nine month media silence. Defendants were permitted to question prospective jurors regarding their exposure to this particular publicity, and the trial judge allowed each defendant five, instead of three, peremptory challenges. The defendants, who exercised their challenges jointly, used only thirteen of an allowable fifteen peremptory challenges, and only two of an allowable three peremptory challenges for alternate jurors. (Clerk's Jury List filed to Commonwealth v. Vincent A. Santarelli, No. 80181201). To have granted a continuance until a new jury panel could be brought in a few days

later, as requested by defendants, would have served no purpose, since exposure to Pretrial Exhibits 1, 2, and 3 was just as likely among members of a new panel as among members of the original. In any event, defendants can demonstrate no prejudice since none of the fifteen jurors who admitted reading about defendants' case in June 15 or 16's newspapers was selected to serve.

Throughout the trial defendants offered into evidence as exhibits various newspaper clippings pertaining to this case. These were numbered Pretrial Exhibits 4 et seq. for consistency's sake and to avoid confusion with other trial exhibits. Although defendants also cite the prejudicial effect of these later "pretrial" exhibits, we note that they were substantially factual accounts of the evidence presented at trial. Further, there is no indication whatsoever

that any juror saw these articles and, indeed, the judge continually admonished the jury not to read or listen to information concerning the case from any source. In fact, no positive response was received when, at the request of defendants, the trial judge specifically asked the jury of twelve plus two alternates whether any of them had read Pretrial Exhibit 4 (N.T. 809-11).

Finally, the fact that certain prospective jurors, not selected to serve, admitted to having participated in discussions of this case while gathered in the jury assembly room does not require a finding of jury prejudice. One individual taking part in such a discussion indicated that the concern of those involved was with whether or not they would be chosen to sit on defendants' case as opposed to having nothing to occupy their time (Voir Dire

159-60). Further, in Commonwealth v. Brantner, 486 Pa. 518, 525, 406 A. 2d 1011, 1013 (1979), the Supreme Court of Pennsylvania dealt with this same issue by affirming the trial court's denial of change of venue, and stated instead that "prospective jurors [need not] be free of all knowledge of the facts and circumstances surrounding the incident which forms the basis of the trial."

In any event, after each group of selected jurors was announced, the trial judge admonished them not to discuss the case with anyone, or read or listen to any information about it. Thereafter, upon completion of jury selection the trial judge asked the twelve jurors and two alternates whether any of them had discussed the case since the time he had instructed them not to do so, and when no affirmative response was received,

the jury was sworn (Voir Dire 197). Thereafter, the court immediately instructed the jurors that the disposition of the case must be based solely upon the evidence and instructions on the law without allowing anything else to influence their verdict (Voir Dire 197-199). For all of the above reasons, defendants' requests for a change of venue or continuance were not required, and these motions were properly denied.

IV. Opening and Closing Speeches of the Assistant District Attorney

Defendants next contend that the assistant district attorney made improper comments in his opening and closing speeches, and that these comments deprived defendants of a fair trial. Before focusing on the specific remarks complained of we will first summarize the legal principles applicable to defendants' contention.

We recognize at the outset that although the prosecutor operates within the adversary system, his unique position as a quasi-judicial officer representing the Commonwealth dictates that he seek justice, and not merely convictions. Commonwealth v. Gilman, 470 Pa. 179, 368 A. 2d 253 (1977). Accordingly, in arguing his case to the jury, the Commonwealth's attorney must not (1) intentionally misstate the evidence or mislead the jury concernig the inferences it may draw, (2) express a personal opinion regarding defendant's guilt or the veracity of any testimony presented, (3) appeal to the passions or prejudices of the jury, or (4) make any comments which would divert the jury from its responsibility to decide the case solely on the evidence adduced at trial. Commonwealth v. Cherry, 474 Pa. 295, 378 A. 2d 800 (1977). However, not every

intemperate or unnecessary remark by the prosecutor entitles defendant to a new trial. Rather, retrial is required only where the "unavoidable effect [of the language used] would be to prejudice the jury, forming in their minds fixed bias and hostility toward the defendant, so that they could not weigh the evidence and render a true verdict." Commonwealth v. Stoltzfus, 462 Pa. 43, 61, 337 A. 2d 873, 882 (1975), quoting Commonwealth v. Simon, 432 Pa. 386, 394, 248 A. 2d 289, 292 (1968). Further, any remarks alleged to be prejudicial must be judged in the context in which they were delivered. Commonwealth v. Smith, 490 Pa. 380, 416 A. 2d 986 (1980), and comments which might otherwise require reversal may at times be justified as a legitimate response to the arguments of defense counsel. Commonwealth v. Stoltzfus, supra. Finally, curative

instructions by the court may on occasion lessen the prejudicial effect of improper remarks, thus avoiding the necessity of a retrial. Commonwealth v. Henry, 295 Pa. Super. 47, 440 A. 2d 1215 (1982).

Keeping these principles in mind, we will now consider some specific comments made by the assistant district attorney which have been cited by defendants as examples of prosecutorial misconduct. Defendant Steingraber argues that the assistant district attorney, in his opening statement, erroneously advised the jury that "as [the pickup truck] went out of [George Kontrabecki's] sight it came into the sight of the Pennsylvania State Police." (N.T. 214). However, neither Steingraber nor his co-defendants objected to this statement at any time during trial, and this issue is therefore waived. Commonwealth v. Long, 258 Pa. Super. 312, 392 A. 2d 810

(1978). In any event, an examination of the testimony of Agent George Kontrabecki and Trooper Leon Huey, together with the markings that each made on Exhibit 1 indicating the extent of their surveillance of the truck, reveals that this statement was supported by the Commonwealth's evidence, and the jury could properly make a finding to this effect.

Defendant Guinther contends that prejudicial error occurred when the assistant district attorney told the jury in his opening address that "ten miles east of Jacksonville, Florida, Agent Kontrabecki and several other agents from the Customs Department fell in behind the airplane which they believed to be the same one flown by Mr. Guinther, and they followed that airplane and kept it in sight all the way to the Washington/ Baltimore Airport." (N.T. 212). The

assistant district attorney subsequently offered to prove the facts contained in the above-quoted excerpt, but the trial judge sustained defendant Guinther's objection to such testimony (N.T. 433-34). Agent Kontrabecki was permitted to testify, however, that he took off from Jacksonville for the purpose of pursuing a plane. Guinther then moved for a mistrial (N.T. 439) on the ground that the Commonwealth, as a result of the court's ruling, would be unable to demonstrate the visual surveillance referred to in its opening speech. The trial judge properly denied this mistrial motion in view of the fact that the assistant district attorney made the statement believing in good faith that he could prove it. Commonwealth v. Farquharson, 467 Pa. 50, 354 A. 2d 545 (1976); Commonwealth v. Johnson, 287 Pa. Super. 58, 429 A. 2d 718 (1981).

As Agent Kontrabecki had already testified to the visual surveillance at the suppression hearing (S.T. 157; Finding of Fact 16), the prosecutor clearly did not invent the statement in an attempt to mislead the jury. Rather, he merely failed to anticipate the fact that, because some of the testimony offered at the suppression hearing to establish probable cause was excludable hearsay at trial, Kontrabecki's testimony regarding visual surveillance of an airplane between Jacksonville and Baltimore, without certain other evidence presented at the suppression hearing, could not be connected to the aircraft N6729T. Bad faith cannot be imputed from this mistake, and in any event, the assistant district attorney's statement, when viewed in light of all of the other evidence establishing Guinther's guilt, is not so inherently

prejudicial as to require a new trial. Commonwealth v. Farquharson, supra.

Defendants also challenge the propriety of numerous statements made by the assistant district attorney in his closing speech, and cite the following four passages as being assertions by the prosecutor of his personal opinion:

> (1) "We have had a year and a half to sit back like Monday night quarterbacks and analyze each and every thing that was done here, and it sounds so simple now to look back in retrospect and say, 'Why didn't the Customs people take a vacuum cleaner and dust William J. Steingraber to see if he had marijuana debris?' and 'Why wasn't the bumper of the pick-up truck dusted for fingerprints?' and 'Why wasn't each and every tiny little fiber in Exhibit No. 12 taken out and analyzed along with head hairs and everything else?'
>
> It's very simple and very unfair to look back on events that took place in the middle of the night in the cold when these men were involved in the heat of an investigation or criminal investigation." (N.T. 1067).
>
> (2) "Mr. Gillman [the FAA employee in the control tower at

Vero Beach] was not asked to identify these bundles here in court. The man was two hundred feet away from this airplane. He only saw parts of boxes. He did not go down. He did not examine the boxes or mark them in any way. It would be impossible for Mr. Gillman or for Andrew Bradley [the Vero Beach police officer] to testify for sure that these were the boxes ---" (N.T. 1070).

(3) "First of all, why would George Kontrabecki come into this courtroom and lie on the witness stand in this case? That is not only not nice, it's not only a lie, it's a crime. It's the crime of perjury to come into a courtroom and take an oath to tell the truth and lie."

"Now, George Kontrabecki testified he has been a Customs agent -- I forget exactly how many years, but it's been a number of years. He has been an agent for quite a while. What possible motive could George Kontrabecki have for coming in here and lying in this case, and even if you think he was lying, don't you think he could have told better lies here? If he's really the smart professional witness, the professional liar that the defense wants you to believe he is, why didn't he tell better lies here, because all he had to do was say a few other things and that really would have covered some of the gaps in this case."

"All Agent Kontrabecki had

to say was, 'As I was driving up to this airplane parked on the ground, I saw two men. I saw Mr. Steingraber and Mr. Santarelli, and they were getting out of the airplane and each one threw a brown bundle in the back of the truck and they drove off and the license plate number of the pickup truck was CC-72706, and I saw that the lights went on as it went out the gate.' If Agent Kontrabecki wanted to lie --" (N.T. 1089-90).

(4) "At any rate, my burden here is to prove these defendants guilty beyond a reasonable doubt, and although there may be some doubt here in this case for certain different things, I suggest to you that none of the doubts in this case rise to a reasonable doubt. None of the cross-examination has raised anything that amounts to a reasonable doubt. No matter what anybody says about bridges or David and Goliath, there is no reasonable doubt in this case, and under all of the evidence all three of these defendants are guilty as charged of possessing marijuana, and possessing it with the intent to deliver it and criminal conspiracy." (N.T. 1103-04.)

None of the above-quoted statements by the assistant district attorney can reasonably be interpreted as expressions of his <u>personal</u> opinion. Rather, each

in effect requested the jury to come to certain findings and conclusions based upon the evidence presented, the reasonable inferences therefrom, and common sense. The first comment (1) regarding "Monday night quarterbacks" was clearly a response to defense arguments implying that police and customs officers did not adequately investigate factors which might tend to exculpate defendants.[6] Further, the trial judge sustained a defense objection to the word "unfair" and instructed the assistant district attorney not to use that term. (N.T. 1067-68).

In the second excerpt (2) quoted above, the assistant district attorney made a proper argument concerning an inference which the jury could reasonably draw from the testimony of Mr. Gillman and Officer Bradley. The assistant district attorney perhaps overstated

his case a bit by his use of the word "impossible," but the trial judge in effect cautioned the jury on this point (N.T. 1070), and in any event the failure of Mr. Gillman and Officer Bradley to identify the bundles of marijuana in the courtroom was favorable rather than unfavorable to the defendants.

The assistant district attorney's remarks in the third statement (3) quoted above were again intended to counter a very strong attack by the defense on Agent Kontrabecki's credibility.[7] The prosecutor never stated his personal opinion that Agent Kontrabecki was telling the truth, or "vouched" for Kontrabecki's testimony, but rather asked the jury to consider what motive Kontrabecki would have to lie. Although we do not condone the implication, if such in fact was conveyed, that Kontrabecki's status as a law enforcement officer somehow

bolstered his credibility, defendants were not prejudiced thereby in light of the ample opportunity they were afforded during voir dire to determine the weight prospective jurors would give police testimony vis-a-vis testimony from other sources, and the instruction by the court that "[a] witness should not be more readily believed or disbelieved or his testimony be given more or less weight merely because he holds a certain title or position than that of another witness." (N.T. 1127). Further, in his statements regarding Agent Kontrabecki the assistant district attorney did not impermissibly argue facts not in evidence, as defendants contend. Rather, his comments concerning the "better lies" Kontrabecki could have told were clearly stated in hypothetical terms, and there was no possibility that the jury could have interpreted them

otherwise. In any event, after a defense objection, the trial judge instructed the jury to ignore what Kontrabecki could have said and focus on what he and other witnesses did say. (N.T. 1090).

The fourth statement (4) is essentially an argument that the evidence demonstrates defendants' guilt, not an expression of personal opinion. The Commonwealth's attorney may always argue that the evidence proves defendant guilty as charged. Commonwealth v. Smith, supra; Commonwealth v. Henry, supra. To find prejudice to the defendants merely because the prosecutor stated that "under all of the evidence . . . defendants are guilty as charged" (emphasis added), as opposed to stating "all of the evidence proves defendants guilty as charged" would give undue weight to a minor semantic distinction. The words the assistant district attorney chose made

it clear to the jury that they were being asked to act on the basis of the evidence. Further, the jury was repeatedly told, by the court and counsel, that defendants were innocent until proven guilty; therefore, the use of the words "are guilty" was not prejudicial. In addition, the assistant district attorney did not express his personal opinion regarding the credibility of defendants' character witnesses by suggesting that their testimony did not raise a reasonable doubt. His comments, read as a whole, are to be reasonably interpreted as an argument that, even assuming the truth of defendant's reputation testimony, the remainder of the evidence nonetheless demonstrated defendant's guilt beyond a reasonable doubt.

In any event, the trial judge, at the close of the prosecutor's speech, gave the following cautionary instruction

to the jury:

> "One other comment I will make with respect to Mr. Dautrich's closing argument. The most he can do is ask you to find guilt based on the evidence rather than tell you to find anyone guilty or rather than he saying that they are guilty or that in his opinion they are guilty, so if he made any such comments to you, you will ignore them and you will arrive at your verdicts solely on the basis of the evidence and in accordance with the instructions on the law." (N.T. 1104-05).

Therefore, even if some of the prosecutor's comments could be interpreted narrowly as an expression of personal opinion, the above curative instruction negated any possible prejudice.

Defendant Steingraber also contends that the assistant district attorney, in his closing address, vouched for the credibility of Commonwealth witnesses. For example, Steingraber challenges the following statements:

> "By virtue of his training he [Agent Kontrabecki] is acute.

He is tuned in to certain things just like anybody who works in a certain profession such as a doctor." (N.T. 1085).

"At any rate, you should rightfully consider when you are judging the credibility of all these witnesses that some of these police officers, some of them have been police officers - Lieutenant Pijar I think said thirty-two years. Huey and Belsterling, all these men have been police officers for a long time. What motive do these people have to come in here and lie, distort testimony . . . " (N.T. 1090-91).

The first comment hardly amounts to "vouching"; rather, it is a proper argument directed to the common sense and everyday experience of the jurors. The second comment merely requested the jury to evaluate the credibility of certain Commonwealth police witnesses by inquiring as to what motive they would have for lying or distorting testimony, and even if there was any implication that these witnesses were credible, defendants were not prejudiced for reasons

already discussed above with respect to the second excerpt (2) of the assistant district attorney's comments.

We have reviewed the other comments claimed by defendants to have been prejudicial and are satisfied that no improprieties justifying retrial occurred. In conclusion we point out that defense counsel themselves engaged in spirited argument and provoked a spirited response by the Commonwealth. Further, counsel for Santarelli and Steingraber proceeded, without objection from the assistant district attorney, to place their arguments before the jury not only in their closing speeches but in their opening speeches as well. Counsel for Santarelli gave such an opening speech even though no evidence was presented by Santarelli. The only evidence presented by Steingraber consisted of character testimony but scant reference

was made to this evidence in the opening speech of counsel for Steingraber. I light of the spirited trial that took place, the content of the opening and closing arguments of defense counsel as well as the Commonwealth, the evidence presented, and the instructions to the jury from time to time, we are unable to find any prejudice to defendants as a result of the assistant district attorney's opening and closing arguments.

V. Miscellaneous issues.

Finally, defendants raise a number of issues which are more limited in scope than those previously discussed and which we group together for the sake of convenience. In this section we of course consider only those contentions which have been adequately briefed.

Defendants Steingraber and Guinther contend that the court erred in consolidating the cases for trial.

However, 18 Pa. C. S. A. §903(d)(i) specifically provides for the joint trial of co-conspirators, and defendant made no motion for severance under 18 Pa. C. S. A. §903(d)(2)(iii). In any event, a motion for consolidation is addressed to the sound discretion of the Court and will not be reversed absent an abuse of that discretion. Commonwealth v. Norman, 272 Pa. Super. 300, 415 A. 2d 898 (1979). Defendants cite no specific instances of prejudice resulting from consolidation, but instead Steingraber asserts only the argument that the evidence against Guinther was "irrelevant" to that against himself and Santarelli. Such a claim is baseless in view of the fact that the totality of the evidence substantiated particularly the conspiracy charge as well as the charges of possession and possession with intent to deliver marijuana, involving a scheme

of participation by all three defendants in transactions constituting the offenses charged. Pa. R. Crim. P. 1127 A(2). Further, consolidation was clearly warranted on grounds of judicial economy and did not prejudice defendants' right to a fair trial.

Defendant Guinther contends that the trial court erred in admitting evidence concerning his activities in Florida after the Commonwealth, in answer to defendant's request for a bill of particulars specifying the dates, times, and locations of the crimes charged, responded that Guinther committed the crimes of possession and possession with intent to deliver on November 12, 1980 between 2:00 a.m. and 4:00 a.m. at or near the Reading Airport in Berks County, Pennsylvania, and the crime of conspiracy at times and places unknown in Berks County on and prior to November 12, 1980.

At trial, counsel for defendant Guinther objected to the opening statements of the assistant district attorney concerning events in Florida, pleading surprise and requesting a mistrial, which was denied by the court. (N.T. 208-09). Guinther renewed his objection when the Commonwealth offered its first Florida witness, but was again overruled by the court (N.T. 294-96). It is true that "the function of a bill of particulars is to enable the accused to prepare for trial and to prevent surprise." Commonwealth v. Simione, 447 Pa. 473, 291 A. 2d 764, 766 (1972). However, in light of the extensive testimony presented at both the preliminary hearing and the pretrial hearing concerning defendant Guinther's activities in Florida, his plea of "surprise" made at trial is totally without merit. More importantly, the testimony given by the

Commonwealth's witnesses to events in Florida did not contradict or go beyond the bill of particulars, as was the case in Commonwealth v. Simione, supra and Commonwealth v. Bartman, 240 Pa. Super. 495, 367 A. 2d 1121 (1976), cited by Guinther; rather, such testimony merely constituted circumstantial evidence, which, together with other evidence, tended to show that Guinther in fact committed the crimes charged within Berks County, as set forth in the bill of particulars. The trial judge committed no error when he admitted the testimony and refused Guinther's motion for mistrial.

Defendants Guinther and Steingraber argue that the court improperly denied defense counsel access to the assistant district attorney's notes. The facts relevant to this contention are as follows: Attorney Bernhart, counsel

for defendant Guinther, during his cross-examination of Wendell Mihalak, requested that "the Commonwealth produce any previous statements of this witness . . . or any notes that Mr. Dautrich [the assistant district attorney] may have made in interviewing this witness." Mr. Dautrich responded "that the defense attorneys have been given copies of the police report, and there is nothing else unless he wants to see my notes," and at Mr. Bernhart's request Assistant District Attorney Dautrich voluntarily gave his trial notes to Mr. Bernhart (N.T. 242). During further cross-examination, Attorney Bernhart asked Mihalak on two occasions if he ever told Mr. Dautrich that Guinther called in his airplane as No. 75880 to which Mihalak replied "No" (N.T. 246, 247). Following the cross-examination of Mihalak by Attorney Bernhart on various other matters

and after a recess, Mr. Bernhart again asked for the notes which had been returned to Assistant District Attorney Dautrich, in order to again question whether Guinther had given Mihalak the call number 75880, and Mr. Dautrich refused to relinquish the notes again. At sidebar Mr. Dautrich explained that his notes were his work product based on conversations with everybody involved and included different things he wanted to check on, that the notes were not inclusive, all encompassing notes of statements, and that he didn't know where the number 75880 came from (N.T. 261-262). The court stated that if the notes reflected verbatim or closely accurate statements made by the witness, or if they were identifiable as notes of a conversation between a particular witness and Mr. Dautrich, the statement must be made available to defendants (N.T.

260, 262). Mr. Bernhart did not ask for a hearing in the absence of the jury but agreed that the court could "rely upon what Mr. Dautrich tells us" (N.T. 262-263). The court asked Mr. Dautrich whether he could state where and from whom he obtained the number 75880 to which Mr. Dautrich replied "No". The court then denied Mr. Bernhart's request that the court order Mr. Dautrich to turn over his notes (N.T. 263).

This ruling was proper in view of the nature of the assistant district attorney's trial notes. Since the notes were not verbatim or substantial verbatim factual accounts of interviews with witnesses who subsequently testified at trial, they did not fall within the holding of Commonwealth v. Contakos, 492 Pa. 465, 424 A. 2d 1284 (1981) requiring disclosure to the defense. the assistant district attorney's initial

accommodation by voluntarily furnishing his notes to the defense for use during cross-examination did not preclude his later decision to withhold them when defense counsel wanted to ask the witness the same question for the third time, as defendants had no right to see the notes in the first place. Defendant Steingraber's argument that the assistant district attorney's actions denied him access to "exculpatory" evidence, i.e., the number 75580, is without merit. Even if Mihalak had mentioned this call number as being used by Guinther, such evidence would in no way "exculpate" Steingraber. Any benefit to be gained by defendants in terms of attempting to impeach Mihalak's credibility had already been realized through Attorney Bernhart's cross-examination, and Steingraber could not profit from further exploration of this issue.

In any event, defense counsel had possession of and opportunity to inspect and use Mr. Dautrich's notes for an extended cross-examination of Mihalak until the notes were returned to the assistant district attorney, during which cross-examination Mihalak on two occasions testified Guinther had not given Mihalak the call number, and Mr. Dautrich stated to defense counsel and the court that he didn't know where or from whom he obtained the number. Just what further purpose the continued use of Mr. Dautrich's notes would have served was not stated by defendants, and if there was any error in the court's ruling it was harmless error beyond a reasonable doubt.

Defendant Guinther contends that the trial court erred in denying him the opportunity to cross-examine Lieutenant Stanley Pijar, a member of

the Pennsylvania State Police having the only key to Troop L's evidence locker, regarding an alleged instance in which the security of the evidence locker was breached. Guinther's counsel represented to the court at sidebar that as part of a Berks County case entitled Commonwealth v. Tasco and Weinman, the state police in 1968 or 1969 conducted a raid which resulted in the seizure of certain coins and their subsequent storage in the state police evidence locker, and that when the case came to trial in 1973 or 1974, an extra dime was allegedly discovered among the evidence. Attorney Bernhart offered this evidence as being relevant to whether or not the evidence locker "was in fact a secured and sacrosanct area" (N.T. 824-25). Defendant's contention is totally without merit and hardly merits discussion. Evidence of a condition

that may have occurred ten or more years ago is not proof of a present day condition and is therefore inadmissible because of remoteness and irrelevancy.

Guinther next contends that the trial court erred in admitting into evidence a card bearing rolled, inked impressions of his fingerprints (Exhibit 2), and in allowing testimony that the fingerprints appearing on said card matched those found in the aircraft N6729T. The gist of defendant's argument is that the chain of custody of Exhibit 2 was not properly established. The record discloses that State Police Corporal Stiver identified Exhibit 2 as the same fingerprint card on which he on November 12, 1980 took rolled, inked impressions of all ten of Guinther's fingers appearing thereon and identified his (Stiver's) signature placed thereon, as well as Guinther's signature placed

thereon in Stiver's presence (N.T. 394-395). State Police Corporal Petrosky testified that on November 12, 1980 he took latent fingerprints from the airplane and the following day compared them with the prints contained on the same Exhibit 2, which at the time was also initialed by Petrosky (N.T. 753). Whether Stiver placed Exhibit 2 in the Guinther file at state police headquarters and then handed it to Petrosky or placed it on Petrosky's desk is of no consequence. "[T]he Commonwealth need not show a complete chain of custody - it is sufficient to show evidence establishing a reasonable inference that the identity and condition of the evidence have remained the same from the time it was first received until the time of trial." Commonwealth v. Oates, 269 Pa. Super. 157, 163, 409 A. 2d 112, 115 (1979). We conclude that the Commonwealth's

evidence concerning Exhibit 2 satisfied this standard, and that this exhibit and testimony relative thereto were properly admitted into evidence.

Defendant Steingraber argues that the court erred in allowing State Trooper Haberstroh to testify that possession of 343.6 pounds of marijuana is not consistent with personal use. However, Haberstroh was clearly qualified to give such an opinion in view of his fourteen years of experience with the Troop L Vice unit and his special training in narcotics. At sidebar the trial judge sustained a defense objection to any testimony that possession of the amount in question is "more consistent with an intent to sell," but allowed the testimony that was in fact given. Steingraber made no request to cross-examine Haberstroh on his qualifications before Haberstroh stated his opinion,

but instead questioned the trooper on qualifications thereafter (N.T. 866-79).

Defendant Guinther contends that the court erred in not instructing the jury that they could find the defendant guilty of possessing only a small amount of marijuana, based upon testimony that the amount removed from the aircraft N6729T weighed less than thirty grams. However, such a finding by the jury would not have been consistent with the offenses charged, the contentions of the parties,[8] and the totality of the evidence presented. The issues involved were whether or not Guinther participated in a criminal conspiracy to commit and/or committed the offenses of possession and/or possession with intent to deliver approximately 343 pounds of marijuana, the basis on which the case was submitted to the jury (N.T. 1120-1121). Therefore,

Guinther's requested instruction was properly refused.

Defendants raise various other objections to the wording of the trial judge's charge to the jury and his refusal to include certain requested points for charge. Most of the requested points were included in modified form of language by the trial judge, and other requested points were properly refused. "It is well established that a trial judge is not required to accept a requested instruction verbatim, even if legally correct and timely filed. The court is free to select its own form of expression, so long as the issue is adequately, accurately and clearly presented to the jury." Commonwealth v. Gardner, 246 Pa. Super. 582, 589-90, 371 A. 2d 986, 989-90 (1977). "[I]n reviewing jury instructions for prejudicial and reversible error, the

charge must be read and considered as a whole. Commonwealth v. Lesher, 473 Pa. 141, 373 A. 2d 1088 (1977). Error cannot be predicated on isolated excerpts of the charge. It is the general effect of the charge that controls." Commonwealth v. Woodward, 483 Pa. 1, 4, 394 A. 2d 508, 510 (1978). We conclude that the charge was clear and comprehensible, fair and proper, and without error.

Finally, defendants Guinther and Santarelli contend that the court established unreasonable time limitations for briefing and argument on post verdict motions. The jury verdicts were returned June 23, 1982 and defendants filed post verdict motions twelve days later on July 6, when the court ordered that argument be scheduled for August 3. The record was transcribed promptly and in order to accommodate defendants copies

thereof were distributed to defendants in advance of final numbering of pages of some portions thereof and of formal lodging with the Clerk of Courts. Defendants filed voluminous briefs of argument, and at their request argument was deferred until August 6. However, on August 6 all three defendants appeared in court and informed the trial judge that they wished to waive oral argument. Under these circumstances defendants can hardly be heard to complain that they lacked adequate time to prepare their briefs and present their arguments. We conclude that defendants' contentions are without merit.

We have reviewed the merits of all of the other contentions properly raised by defendants, and are satisfied that they raise no errors requiring a new trial. For all of the above reasons, therefore, we deny defendants' motions for new trial and/or arrest of judgment.

FOOTNOTES:

[1]The Controlled Substance, Drug, Device and Cosmetic Act, Act of April 14, 1972, P.L. 233, No. 64, §§13(a)(16) and 13(a)(30), 35 Pa.C.S.A. §780-113(a)(16) and 780-113(a)(30).

[2]The Crimes Code, Act of December 6, 1972, P.L. 1482, No. 334, §903(a)(i), 18 Pa.C.S.A. §903(a)(i).

[3]In his post verdict motions Guinther raised issues pertaining to both the sufficiency and weight of the evidence, but in his brief failed to discuss either. Accordingly, he must be deemed to have abandoned these contentions.

[4]In their post verdict motions defendants Steingraber and Santarelli also cite as error the failure of the suppression judge to grant a writ of habeas corpus based upon the alleged insufficiency of the evidence presented at the suppression hearings. We note that neither defendant in his brief has actually analyzed or cited any suppression testimony or treated this issue as being in any way separate from the sufficiency of the trial evidence. In any event, the suppression testimony, as summarized in our Findings of Fact and Conclusions of Law of May 26, 1982, was substantially the same as, and in fact more extensive than, that presented at trial and already reviewed above. We therefore conclude that defendants' petitions for a writ of habeas corpus were properly denied.

[5]The nineteen prospective jurors excused for having formed a fixed opinion of defendants' guilt or innocence were Charles P. Schell, Alberta L. Brooks, Richard F. Swavely, Wayne R. Rudolph, Jantina C. Kelchner, Ronald J. Haas, Robert M. Keith, Jr., Mary A. Ruff, Kathryn M. Burkart,

Kimberly A. Lulevitch, Kathleen A. Edwards, Sandra E. Park, Ralph Keiser, Samuel F. Keiser, Lewis F. Witwer, Charles J. Kehs, Velma A. Santoro, Grace H. March and Pauline E. Burgess. The other prospective jurors excused for cause were excused not for having formed a fixed opinion but rather for other unrelated reasons, such as business commitments, a tendency to believe a police officer over another witness merely because of the former's status, an inability to accept the legal principle that an accused need not present any evidence in his own behalf, and so on.

[6]For example, Attorney Lieberman, counsel for Steingraber, made the following comments in his closing address to the jury:

"This is the case of the Commonwealth with its full power, the entire Pennsylvania State Police force, the entire criminal laboratory and even, if he needs it, the FBI laboratory. If they wanted to use it, the FBI laboratory could have been called in on this case. Whether it was or wasn't I don't know."

"You know, Mr. Skrimcovsky said he had a comparison microscope. He would compare these fibers. He could compare hairs, and I'm going to tell you that little strand of marijuana allegedly in Exhibit 12, that bag, could have been taken and matched with random samplings from every one of those bundles under a microscope and, if it's from the same crop, it would be exactly the same. . . . The man said he had a comparison microscope and could make comparisons, the same way there was no objection to the fibers being compared to the fibers in the bottom of the plane and out of the rug of the plane, and if the Commonwealth would have wanted to, they could have stood Mr. Steingraber up and vacuumed him to find out -- you know, if these bags were torn the way they say or implied they were, do you mean there would have been no marijuana debris

on this man if they had loaded it? You have to remember the plane only got there a short while before, according to their testimony. There was no activity between the plane and the cargo truck. None. When I say 'no activity', no one moving back and forth, no unloading, but I guarantee you the State Police if they wanted to -- and no one can deny this -- could have stood Mr. Steingraber on a sheet, brushed his clothes off and looked for fibers, comparative hairs or marijuana residue or debris, and I guarantee you, if those packages were torn the way they would like you to believe . . . there would have been residue on Mr. Steingraber if he's the one that loaded the truck or got near one of those bales even though they can't even put him at the plane, no fingerprints of his on the exterior of the plane, none on the interior or the plane, and there is no way you can get it out without going in. Just look at that plane in Exhibits 4 and 5." (N.T. 1046-48).

[7]For example, Attorney Bernhart, counsel for Guinther, made the following argument during his closing speech:

"We then get to Officer Kontrabecki, and I have already the major portion of his testimony and showed you inconsistencies and contradictions. Members of the jury, I don't want to suggest to you that I have objections to a police officer being zealous in the pursuit of his duties. I have no objection and, in fact, am grateful for hardworking police officers, but when an individual attempts to be the prosecutor, the witness, the judge and the jury in a criminal case, my oath tells me I must object to that because it is not the function of a police officer, a prosecutor, to determine the guilt or the innocence of an individual. That is a function that you have and that cannot be usurped

and cannot be taken from you, and I question the credibility in all respects of Customs Agent Kontrabecki."

"Does he give you the impression that he has come to this town to show the local yokels how to handle things, how to testify, how to say things and how to conduct a case? If he has attempted to do that, he has failed, and I suggest to you based upon his demeanor, his proven inconsistencies, his proven discrepancies, his attempt to say black is white or black is yellow that you would not cross that bridge if he laid those planks in that bridge and, if you would not do that, you cannot expect Mr. Guinther to do that. Was he less than candid? Did he attempt to volunteer? Was he evasive? You consider that and you judge his demeanor." (N.T. 980-81).

[8]Guinther's request No. 3 of his Request for Bill of Particulars was for "The exact location of the amounts of marijuana forming the basis of the charges of Possession and Possession with Intent to Deliver Marijuana." This was answered in the Commonwealth's Bill of Particulars, "Marijuana found in the airplane N6729T and in the motor vehicle [pickup truck] Reg. CC 72706."

IN THE COURT OF COMMON PLEAS OF
BERKS COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

WILLIAM M. GUINTHER,
Defendant

Criminal No. 80181301

COMMONWEALTH OF PENNSYLVANIA

v.

VINCENT SANTARELLI,
Defendant

Criminal No. 80181201

COMMONWEALTH OF PENNSYLVANIA

v.

WILLIAM JOSEPH STEINGRABER,
Defendant

Criminal No. 80181601

ORDER

W. RICHARD ESHELMAN, J.

December 21, 1982, upon consideration of defendants' post verdict motions for arrest of judgment and new trial, it is ORDERED that defendant's motions are denied.

IN THE SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,
Respondent

v.

VINCENT A. SANTARELLI
and
WILLIAM J. STEINGRABER,
Petitioners

No. 806 E.D. Alloc. Dkt. 1984

ORDER

PER CURIAM

March 4, 1985

Petition for Allowance of Appeal Denied.

IN THE SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,
Respondent

v.

VINCENT A. SANTARELLI
and
WILLIAM J. STEINGRABER,
Petitioners

No. 806 E.D. Alloc. Dkt. 1984

ORDER

[on Petition for Reconsideration]

PER CURIAM

December 17, 1985

Petition Denied.